

10MB

THE
LAW
OF
Costs.

12 Fg

By JOSEPH SAYER, *K*
SERJEANT at LAW.

THE SECOND EDITION:
CORRECTED AND MUCH ENLARGED.

L O N D O N,

Printed by W. STRAHAN and M. WOODFALL,
Law Printers to his Majesty;

For T. CADELL in the Strand; and P. URIEL
in the Inner Temple Lane.

M. DCC. LXXVII.

21

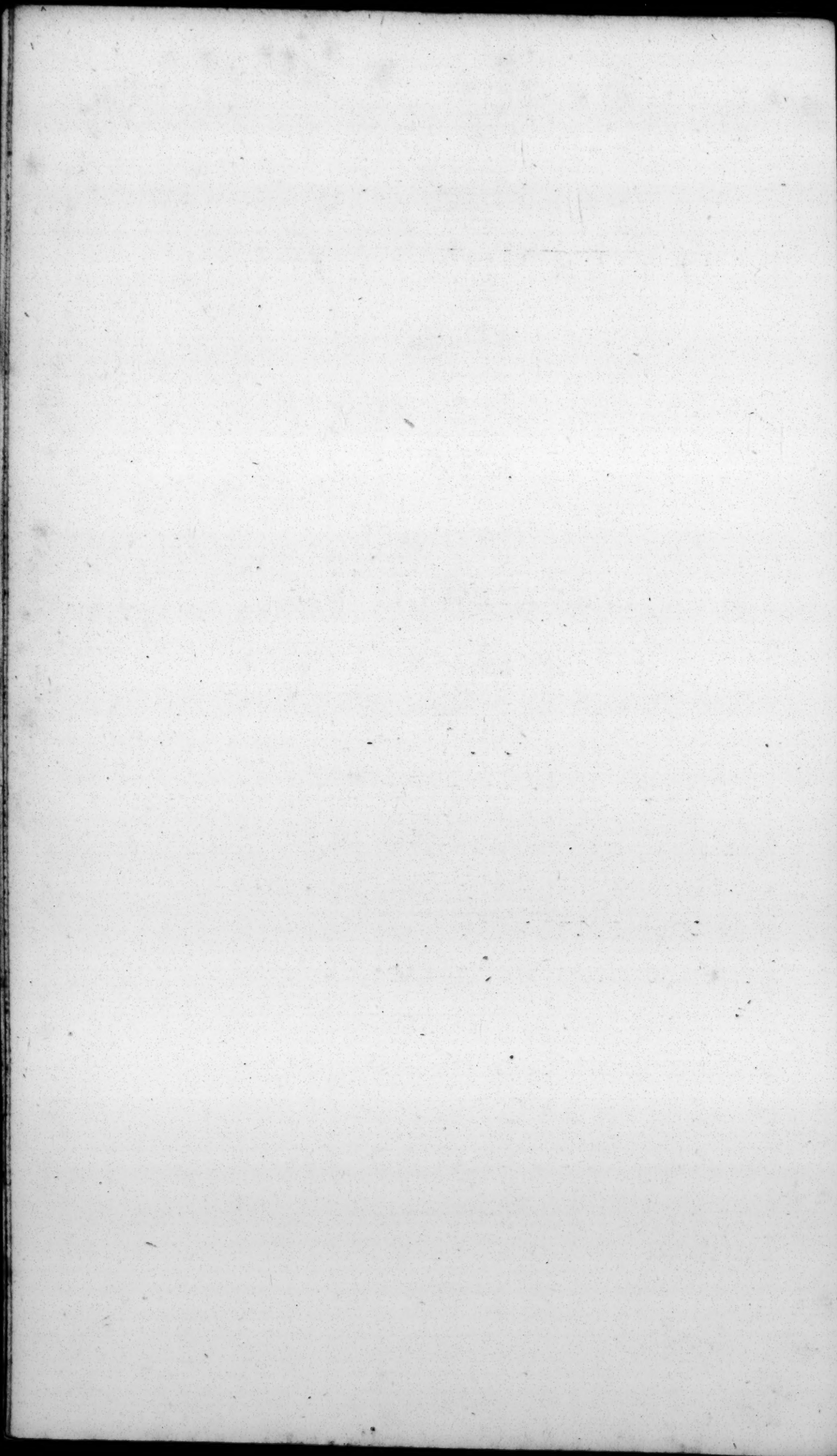


TO THE HONOURABLE
HENRY BATHURST Esq;
ONE OF THE JUSTICES OF HIS
MAJESTY'S COURT OF COMMON PLEAS:
A MAGISTRATE OF GREAT ABILITIES
AND STRICT INTEGRITY ;
A MAN IN EVERY PART OF HIS
PRIVATE CHARACTER MOST AMIABLE :

THIS BOOK IS,
WITH THE UTMOST GRATITUDE
FOR MANY SIGNAL FAVOURS,
DEDICATED
BY HIS MOST DEVOTED AND
MOST HUMBLE SERVANT,

JOSEPH SAYER.

CHANCERY-LANE,
MAY 4, 1768.



P R E F A C E.

TH E R E is no Part of the Law, of which the Knowledge is so frequently useful, as that which relates to Costs. The Objects of different Causes are in many Respects different : But Costs are a very considerable Object in every Cause, and in many the principal. It is consequently the Duty of every Person concerned in the Management of a Cause, to procure, if the Nature of the Case will admit thereof, Costs for his Client ; or, if that cannot be done, to deliver his Client, if this be possible, from the Payment of Costs. No Man can

discharge this Duty, in the Manner a conscientious, or even a prudent Man, would wish to discharge it, unless he has a complete and accurate Knowledge of the Law relative to Costs. The Design of this Book is to assist in the acquiring of such Knowledge.

That Recourse may be readily had to any Part of the Subject, every Part thereof, which is in any Degree extensive, has a distinct Chapter assigned to it. A very few Things, not considerable enough for distinct Chapters, are comprised in two general ones. The Chapters, as far as the Nature of the Subject would admit thereof, are so ranged, that the Matter of the preceding Chapters is introductory to what is contained in those which succeed : And that what is contained in the succeeding Chapters does illustrate,
or

or confirm, what is contained in those which precede. In the Course of the Work such Remarks and Observations are made, as were thought necessary or proper.

Some Mistakes in the former Edition are in this Edition corrected; some Things omitted are supplied; and many Cases, subsequent to the Publication of that Edition, are inserted.

Lately published,

By the AUTHOR of this Book, and Sold by
P. URIEL in the Inner Temple Lane; and
T. CADELL in the Strand,

I. The LAW of DAMAGES.

II. REPORTS of CASES adjudged
in the Court of King's-Bench, begin-
ning *Michaelmas* Term 25 G. 2. end-
ing *Trinity* Term 29 & 30 G. 2.

C O N T E N T S.

C H A P. I.

OF the Right of a Plaintiff, under the Statute of *Gloucester*, c. 1. to Costs,
Page 1

C H A P. II.

In what Cases, the Right of a Plaintiff, under the Statute of *Gloucester*, c. 1. to Costs, may be restrained by a Certificate upon the 43 *Eliz.* c. 6. 13

C H A P. III.

In what Cases, the Right of a Plaintiff, under the Statute of *Gloucester*, c. 1. to Costs, is restrained by the 21 *Ja.* 1. c. 16. 19

C H A P. IV.

In what Cases, the Right of a Plaintiff, under the Statute of *Gloucester*, c. 1. to Costs, is restrained by the 22 & 23 *Car.* 2. c. 9. 27

C H A P.

C O N T E N T S.

C H A P. V.

In what Cases, the Restraint, put upon the
Right of a Plaintiff to Costs by the 22
& 23 *Car. 2. c. 9.* is taken off by the
4 & 5 *W. & M. c. 23.* 53

C H A P. VI.

In what Cases, the Restraint, put upon the
Right of a Plaintiff to Costs by the 22
& 23 *Car. 2. c. 9.* may be taken off by
a Certificate upon the 8 & 9 *W. 3. c. 11.* 59

C H A P. VII.

In what Cases, the Right of a Plaintiff,
under the Statute of *Gloucester, c. 1.* to
Costs, is taken away, and he is obliged
to pay Costs, 62

C H A P. VIII.

Of the Right of a Defendant to Costs, in
Case the Plaintiff be nonsuited, or there
be a Verdict for the Defendant, 69

C H A P. IX.

Of the Right of a Defendant to Costs, in
Case the Plaintiff do not declare in pro-
per Time, or discontinue his Suit, 80

C H A P.

CONTENTS.

xi

CHAP. X.

Of the Right of a Defendant to Costs, in
Case there be Judgment for him upon a
Demurrer, 85

CHAP. XI.

Of Costs, where a Plaintiff sues in *Forma
Pauperis*, 90

CHAP. XII.

Of Costs, where a Plaintiff sues by Guar-
dian, or *Prochein Amy*, 93

CHAP. XIII.

Of Costs, where a Plaintiff sues as Executor,
or Administrator, 94

CHAP. XIV.

Of Costs, in an Action of *Replevin*, or in
an Action of second Deliverance, 103

CHAP. XV.

Of Costs, in an Action of Waste, 111

CHAP. XVI.

Of Costs, in an Action of Debt for not set-
ting forth Tithes, 114

CHAP.

C H A P. XVII.

Of Costs, in an Action against an Officer,
on Account of something done by virtue
of his Office, 116

C H A P. XVIII.

Of Costs, in a Suit relative to the Seizure of
Goods, by an Officer of the Customs,
124

C H A P. XIX.

Of Costs, in a Suit upon a Writ of Prohi-
bition, 132

C H A P. XX.

Of Costs, where a feigned Issue is ordered,
140

C H A P. XXI.

Of Costs, where Money has been brought
into Court, 146

C H A P. XXII.

In what Cases, the Court will make a Rule
for staying the Proceedings in an Action,
until a responsible Plaintiff shall be nam-
ed, or until Security shall be given for
the Payment of Costs 152

C H A P.

CONTENTS.

xiii

CHAP. XXIII.

Of Costs, where Leave is given to amend,
157

CHAP. XXIV.

Of Costs, where a Plaintiff does not proceed to the Execution of a Writ of Enquiry, pursuant to Notice,
160

CHAP. XXV.

Of Costs, where, after Issue is joined, the Trial of a Cause is delayed,
161

CHAP. XXVI.

Of Costs, where the Plaintiff does not proceed to the Trial of a Cause, pursuant to Notice,
171

CHAP. XXVII.

Of Costs, where a Cause is referred to Arbitrators,
175

CHAP. XXVIII.

Of Costs, where a Cause, which was made a *Remanet*, or went off by Consent, at one Affize, is tried at a subsequent Affize,
178

CHAP. XXIX.

Of the Costs of a special Jury,
181

CHAP.

CONTENTS.

CHAP. XXX.

Of the Costs of Witneſſes, 183

CHAP. XXXI.

Of Coſts, where a Repleader is awarded, 185

CHAP. XXXII.

Of Coſts, where a new Trial is granted, 187

CHAP. XXXIII.

Of Coſts, in a Suit upon a Writ of *Scire Facias*, 193

CHAP. XXXIV.

Of Coſts, in a Suit upon a Writ of Error, 196

CHAP. XXXV.

Of Coſts, where there is Judgment, or a Verdict, as to Part for the Plaintiff, 210

CHAP. XXXVI.

In what Caſes, one or more of the Defendants, for whom there is a Verdict, are intitled to Coſts, 214

CHAP. XXXVII.

Of Coſts, where Leave is given to plead ſeveral Matters, 219

CHAP.

C O N T E N T S.

xv

C H A P. XXXVIII.

Of double and treble Costs, 228

C H A P. XXXIX.

In what Cases, the Court will make a Rule for staying the Proceedings in a second Action, until the Costs of a former Action shall be paid, 238

C H A P. XL.

Of deducting the Costs of one Action from those of another, 252

C H A P. XLI.

Of Costs, where a Judgment of Outlawry is superseded or reversed, 257

C H A P. XLII.

Of Costs in an Indictment, 262

C H A P. XLIII.

Of Costs, in an Information for a Misdemeanor, 281

C H A P. XLIV.

Of Costs, in an Information in the Nature of a *Quo Warranto*, 289

C O N T E N T S.

C H A P. XLV.

Of Costs, in a Traverse of one or more
Facts, contained in the Return to a Writ
of *Mandamus*, 295

C H A P. XLVI.

Of Costs in divers Cases, which did not
fall under any of the preceding Chapters, 298

C H A P. XLVII.

Of the Liability of the Attorney in a Cause
to pay Costs, 309

C H A P. XLVIII.

Of taxing an Attorney's Bill, 314

C H A P. XLIX.

Of divers Matters, relative to Costs, which
did not fall under any of the preceding
Chapters, 329

E R R A T A.

- Page 4. line 13. for *Mordacenceſter* read *Mordaunceſter*.
42. 2. for *ought to have* read *ought not to have*.
92. 3. for *diſpanbered* read *diſpaupered*.
157. 19. for *Vitiam* read *Vitium*.
198. 4. for *Prohibition* read *Scire facias*.

Costs.

CHAP. I.

Of the Right of a Plaintiff under the Statute of *Gloucester*, c. 1. to Costs.

A Plaintiff had not, at the Common Law, a Right to Costs in any Action. 2 Inst. 288, 289.

But although a Plaintiff had not, at the Common Law, a Right to Costs in any Action, the Justices in *Eyre* did, in their *Iters*, make a Computation, in Case the Plaintiff had obtained a Verdict, of the Expences he had been at in carrying on the Suit; and, in assessing

B Damages

Gilb. H. C. p. 266.

Damages, did usually assess a Sum sufficient to satisfy that Expence, as well as the Damages.

Gilb. H. C.
p. 266.

It is said, that, as these Justices were not under a Restriction as to the Time of their Sitting in any one County, no Inconvenience could arise from their staying long enough in every one, to make a Computation of the Expence of carrying on the Suits in that County; and it is inferred, that the Statute of *Gloucester* became necessary upon the Discontinuance of Justices in *Eyre*; because the Justices, appointed to go Circuits in their Stead, were not allowed sufficient Time to do this.

This Inference does not appear to be fairly drawn; it being unreasonable to suppose, that the Justices appointed to go Circuits should be so restrained in Point of Time, as not to be able to do a Thing which seems quite proper to be done. It is much more suitable to the Genius of the *English* Law, which is averse to the trusting of Judges with discretionary Powers, to suppose; that

as

as the Costs of carrying on a Suit had, at the Time of making the Statute of *Gloucester*, increased to such a Degree, as to become an Object of Consideration, it was thought more proper ; that the Right of a Plaintiff to recover his whole Costs should be declared by a Statute, than that the Matter should be left to the Discretion of a Judge.

The Statute of *Gloucester* is frequently said to be the first Statute by which Costs are given : But this is a Mistake, for Costs are given by the Statute of *Marleberge*, c. 6.

Before the making of this Statute, 2 Inst. 109. it was a common Practice for Tenants to make fraudulent Feoffments ; in order to prevent their Lords from having the Wardship of their Heirs. To put a Stop to this Practice, whereby Lords were deprived of one of the most valuable Fruits of Tenure, a Writ of Right of Ward was thereby given : But it was at the same Time provided, that in Case the Feoffment, intended to be set aside as fraudulent,

should be found to be made fairly and *bona fide*, the Feoffee should have his Damages awarded, and the Costs which he had sustained.

By the Statute of *Gloucester*, c. 1. It is enacted, " That the Demandant may
 " recover Costs in an Affize of *Novel*
 " *Disseisin* against the Alience of the
 " Disseisor; in a Writ of Entry of *Novel*
 " *Disseisin*, either against the Disseisor,
 " or against him who is found Tenant
 " after the Disseisor; and in Writs of
 " *Mordacencester*, *Coffinage*, *Aiel* and *Be-*
 " *saiel*; and that this Act shall hold
 " Place in all Cases wherein a Man re-
 " covers Damages."

2 Inst. 288.

That Statute does only mention the Costs of the Writ. But the Construction has been, that it extends to the whole Expence of carrying on a Suit.

Ibid.

No Money, expended on the Account of himself, is to be allowed a Plaintiff upon a Taxation of Costs, nor any for the Loss of his own Time.

If

Costs.

5

If Damages are given by a Statute subsequent to the Statute of *Gloucester*, c. 1. in a Case wherein Damages were not recoverable before the making of that Statute, or in a Case wherein Damages are not thereby given, the Plaintiff cannot recover Costs in an Action upon the subsequent Statute, unless Costs are thereby given; because the Damages, thereby given, are given in a Case wherein none were before recoverable.

10 Rep. 116.
Pillford's Case.

An Action of Waste, in which treble Damages are recoverable, is given by the Statute of *Gloucester*, c. 5. against a Tenant for Life, a Tenant for Years, and a Tenant in Dower; but no Costs are recoverable in an Action upon that Statute; because an Action of Waste did not lie against either of these Tenants before the making thereof, and Costs are not thereby given.

Ibid.

And it has for the same Reasons been holden, that Costs are not recoverable in an Action upon the 1 & 2 *Ph. & M.*

2 Inst. 289.

B 3

c. 12.

c. 12. for driving a Distress out of the Hundred.

10 Rep. 116.
2 Barn. 119.

By 2 *Westm.* c. 5. Damages are given in an Action of *Quare impedit*, and in an Affize of *Darrien Presentment*, in two new Cases: But no Costs are recoverable in either of the Cases; because Damages were not before recoverable in either, and Costs are not given by the Statute.

Cro. Car.
427.
Smith v.
Smith.

Costs are not recoverable in an Action of *Formedon*; because Damages are not recoverable therein at the Common Law, and this is not a Case, wherein Damages are given by the Statute of *Gloucester*, c. 1. or by any Statute antecedent thereto.

Cro. Car.
542. Daly v.
Bellamy.

And it has for the same Reasons been holden, that Costs are not recoverable in an Action of Attaint.

10 Rep. 116.
Salk. 206.
1 Ventr. 133.
Rep. Pr. C.
P. 87.

If a certain Sum of Money be given by a Statute to a Party injured, in a Case wherein Damages were before recoverable, Costs may be recovered in an Action

tion upon the Statute, although none are thereby given ; because Damages were before recoverable for the Injury, and the Statute does nothing more than liquidate the Sum which may be recovered.

In an Action against the Hundred for demolishing Houses and Barns, brought upon the 1 *Geo. 1. c. 5.* by which it is directed, that the Inhabitants of the Hundred shall yield Damages to the Person damnified by such Demolishing, to be levied upon the Inhabitants, and paid to the Plaintiff, by such Ways as are provided by the 27 *Eliz. c. 13.* for reimbursing Money recovered against a Hundred by a Party robbed, there was a Verdict for the Plaintiff with Damages. No mention being made of Costs in the 1 *Geo. 1. c. 5.* the Question was, Whether the Plaintiff ought to have Costs ? It was holden that he ought : And by *Willes Ch. J.* the Plaintiff is entitled to Costs under the Statute of *Gloucester, c. 1.* the Words of which are, “ That this Act shall hold Place “ in all Cases, wherein a Man recovers
B 4 Damages.”

2 Will. 91.
Witham v.
Hill and O-
thers.

Damages." The Words in that Statute, "all Cafes," do in my Opinion extend to every Action at the Common Law, and to every Action upon any Statute, antecedent or subsequent to the Statute of *Gloucester*, c. 1. wherein Damages are recovered. *Pilford's Case* 10 *Rep.* 116. seems to me an extraordinary Case: But it is not necessary to over-rule that Case; because the present Case is very different from it. In the present Case, the Plaintiff might have maintained an Action against the Persons who demolished his Houses and Barns, if they could have been found; in which he might have recovered Damages and Costs; and it was the Intention of the 1 *Geo.* 1. c. 5. to give the same Remedy against the Hundred. Costs are not given by the 27 *Eliz.* c. 13. and yet Costs have always been allowed in Actions upon that Statute. And by *Clive J.* in *Pilford's Case*, which is in my Opinion good Law, it is laid down; that if Damages are given by a Statute subsequent to the Statute of *Gloucester*, c. 1. in a new Case, and no Mention is made of Costs, the Plaintiff in an Action

tion upon that Statute cannot recover Costs. The Doctrine, however, of that Case does not apply to the present ; for the 1 G. 1. c. 5. does not give Damages in a new Case : But does only change the Object from whom they may be recovered ; for which Reason the Plaintiff ought in my Opinion to have Costs. And by *Bathurst J.* it has been said ; that all the Cases upon the 27 *Eliz. c. 13.* in which Costs were allowed, passed *sub silentio* : But that is scarce possible. As it will not appear upon the Record in the present Case, that the Matter was debated, it may as well be said hereafter, that this Case passed *sub silentio*. The 27 *Eliz. c. 13.* did not, in my Opinion, give Damages in a new Case ; but did only give a different Remedy against the Hundred ; for the Party robbed might before have maintained an Action against the Hundred, for not keeping Watch and Ward. Costs have always been allowed in Actions upon that Statute, and as the Statute now under Consideration is planned upon the Plan of that Statute, I am of Opinion, that the Plaintiff
ought

ought to have Costs. *Pilford's Case* is, as I think, very good Law, and I am desirous that it should not be shaken. And by *Noel J.* I am of the same Opinion. The 1 G. 1. c. 5. is Auxiliary to the Party injured : But does not give Damages in a new Case.

MS. Rep.
Greetham v.
The Inhab.
of the Hund.
of Theale,
Trin. 5 Geo.
3. in K. B.

The Plaintiff being nonsuited in an Action against the Hundred, brought upon the 9 G. 1. c. 22. for the Damages sustained by his Barn being maliciously set on Fire, it was holden; that the Defendant ought to recover Costs, although Costs are not mentioned in the Statute.

It may from this Case be inferred, that the Plaintiff, in an Action upon that Statute, may recover Costs ; for, as the 18 *Eliz. c. 5.* does only extend to an Action upon a Statute brought by a common Informer, the Right of the Defendant to Costs in this Case could only be founded upon the 4 *Ja. 1. c. 3.* by which Costs are, in the Case of a Nonsuit, given to the Defendant in every
Action

Costs.

II

Action, wherein the Plaintiff might have recovered Costs.

It was in a late Case unanimously holden; that the Plaintiff, in an Action of Debt upon the 4 G. 2. c. 28. for the double Rent given by that Statute, in Case a Tenant wilfully hold over after the Determination of his Term, and after a Demand made and Notice in Writing for delivering the Possession, ought to recover Costs, although Costs are not mentioned in the Statute.

MS. Rep.
Cutting v.
Darby, Trin.
16 G. 3.
in C. B.

If double or treble Damages are given by a Statute to a Party injured, in a Case wherein Damages were before recoverable, Costs may be recovered in an Action upon the Statute, although none are thereby given; because the Statute does nothing more than double or treble the Damages, which were before recoverable for the Injury.

10 Rep. 116.
2 Inst. 289.

If a common Informer bring an Action for the Whole or Part of a Penalty, given by a Statute to any Person who shall sue for the same, he cannot reco-

10 Rep. 116.
Salk. 206.
1 Ventr. 133.
Rep. Pr. C.P.
87.

ver

ver Costs, unless Costs are given by the Statute inflicting the Penalty ; because, his Right of Action is founded solely upon the Statute, and consequently he can only recover what is thereby given.

C H A P. II.

In what Cases, the Right of a Plaintiff, under the Statute of *Gloucester*, c. 1. to Costs, may be restrained by a Certificate upon the 43 *Eliz.* c. 6.

BY the 43 *Eliz.* c. 6. after reciting, that an infinite Number of small and trifling Suits had been prosecuted in her Highness's Courts at *Westminster*, which by due Course of Law ought to have been determined in the inferior Courts in the Country, to the intolerable Vexation of her Highness's Subjects, it is enacted, " That if in any
" personal Action, to be brought in any
" of her Majesty's Courts at *Westmin-*
" *ster*, not being for any Title or In-
" terest of Lands, nor concerning the
" Freehold or Inheritance of any Lands,
" nor for any Battery, it shall appear
" to the Judges of the same Court, and
" be

“ be so signified by the Justices before
 “ whom the same shall be tried, that
 “ the Debt or Damages to be reco-
 “ vered therein shall not amount to the
 “ Sum of Forty Shillings; that in every
 “ such Case the Judges or Justices,
 “ before whom such Action shall be
 “ pursued, shall not award to the Plain-
 “ tiff any more Costs, than the Sum of
 “ the Debt or Damages so recovered
 “ shall amount to, but less at their
 “ Discretion.”

Gilb. Eq.
 Rep. 196.

It was the Intention of this Statute,
 to confine personal Actions for trifling
 Causes to the inferior Courts: But it
 had not that Effect; for whether the
 Judges, to whose Discretion the Power
 of certifying thereupon was left, did
 think it hard, that an injured Party
 should be deprived of his Costs, merely
 because he had applied for Redress to
 one of the superior Courts, or whatever
 else was the Reason, it does not appear,
 that the Power was for many Years
 exercised.

Gilb. Eq.
 Rep. 196.

Nay, it is said in one Case, so late as
 the 12 G. 1. that no Precedent is to be
 found

found of a Certificate upon the 43 *Eliz.* c. 6.

But however disinclined Judges might formerly have been to carry the 43 *Eliz.* c. 6. into Execution, it is by the 11 *W. 3. c. 9.* extended to the Principality of *Wales* and the Counties Palatine; and there have been of late Years some Certificates thereupon.

In an Action of Trespafs, for taking and carrying away Sand, in which there was a Verdict for the Plaintiff with Damages under Forty Shillings, *Willes* Ch. J. certified upon the 43 *Eliz. c. 6.* and the Court would not allow more Costs than Damages.

1 Will. 94.
White v.
Smith, East.
17 G. 2.

Upon a Rule to shew Cause, why the Plaintiff should not have full Costs, in an Action of Trespafs for assaulting the Plaintiff, and taking away a Cart Rope, it appeared; that there was a Verdict for the Plaintiff with One Shilling and Six Pence Damages; and that there was a Certificate upon the 43 *Eliz. c. 6.* The Rule was discharged; and by the Court, this is a mere personal Action, wherein

1 Will. 95.
Walker v.
Robinson.
Trin. 18 G. 2.

wherein no Freehold was in Question, nor was there any Battery ; and as the Judge has certified, that the Damages are only One Shilling and Six Pence, there is nothing to take this Case out of the 43 *Eliz. c. 6.* and the Court has no Power to judge contrary to an Act of Parliament. And by *Dennison J.* an Action of Battery was probably mentioned in the 43 *Eliz. c. 6.* because it might be thought, that such Action would not lie in the County Court ; and it is certain, that such Action *vi et armis* will not lie there : But I do not know, that it will not lie there without *vi et armis*.

2 Will. 258.
Bartlett v.
Robbins,
East. 5 G. 3.

In an Action of *Assumpsit*, the Defendant pleaded a Tender of Ten Shillings and Sixpence. The Plaintiff, after taking this out of Court, proceeded, and obtained a Verdict with One Guinea Damages. As the Judge certified upon the 43 *Eliz. c. 6.* the Question was, whether the Plaintiff ought to have full Costs ? It was holden that he ought not ; and by *Pratt Ch. J.* this Action is clearly frivolous, and the Plea of Tender does not alter the Case.

The

The Defendant in an Action of Trespass justified the taking of a Distress, as Agent to General *Cholmondeley*, by Virtue of a Reservation in a Lease of Land from the General to the Plaintiff. Issue was joined upon a Traverse of the Defendant's being Agent to the General; a Verdict with One Penny Damages was found for the Plaintiff; and there was a Certificate upon the 43 *Eliz.* c. 6. A Question arising, whether the Plaintiff ought to have any more Costs than Damages? It was holden, that he ought; and by *Dennison J.* (*Ryder Ch. J.* being absent) it has been said, that this is not a Case in which a Certificate ought to be granted upon the 43 *Eliz.* c. 6. an Interest in Land being in Question; and the Case of *Affer v. Finch*, 2 *Lev.* 234. has been relied upon; in which it was holden, that the Plaintiff, for whom a Verdict with Damages under Forty Shillings was found, upon an Issue joined on a Plea of *Extra viam* was intitled to full Costs, although there was no Certificate that the Title of the Land was chiefly in Question. But in that Case, the Extent of the Way,

Sayer 250.
Howard v.
Cheshire,
Mich. 29 G.
2.

C.

and

and consequently an Interest in Land, was directly in Question; whereas in the present Case, the Issue is collateral to the Plaintiff's Interest in the Land demised.

2 Lev. 124.
Gavel v. Scudamore.
4 Mod. 379.
Raym. 395.

A Certificate upon the 43 *Eliz. c. 6.* ought not to be granted, where a Suit, commenced in an inferior Court, has been removed by the Defendant into a superior Court; it being the Defendant's Fault, that the Cause was not tried in the inferior Court.

MS. Rep
Holland v.
Gore, Trin.
32 G. 2.

It has been holden by the Court of Common Pleas, that a Certificate upon the 43 *Eliz. c. 6.* may be granted after the Trial of the Cause; and it was said by *Willes* Ch. J. that he remembered the granting of a Certificate thereupon Six Months after the Trial of the Cause.

C H A P. III.

In what Cases, the Right of a Plaintiff, under the Statute of *Gloucester*, c. 1. to Costs, is restrained by the 21 *Ja.* 1. c. 16.

BY the 21 *Ja.* 1. c. 16. it is enacted, “ That in all Actions upon the Case for slanderous Words, “ to be sued or prosecuted in any of “ the Courts of Record at *Westminster*, “ or in any Court whatsoever that hath “ Power to hold Plea of the same, if “ the Jury upon the Trial of the Issue “ in such Action, or the Jury that “ shall enquire of the Damages, do find “ or assess the Damages under Forty “ Shillings, then the Plaintiff or Plaintiffs in such Action shall have and recover only so much Costs, as the Damages so given or assessed amount unto, without any further encrease of the same; any Law, Statute or

C 2

“ Usage

“ Usage to the contrary notwithstanding.”

Salk. 2 7.

It is said to have been resolved, *Mich. 5 Car. 1.* by all the Justices of the King's Bench and Common Pleas, that although the Court is restrained, by the *21 Ja. 1. c. 16.* from giving Costs *de incrementis* in an Action of Slander, where the Damages found or assessed by the Jury do not amount to Forty Shillings, the Jury are not restrained thereby : But on the contrary, that they may find or assess Costs to the Amount of Ten Pounds, although they only find or assess Damages to the Amount of Ten Pence.

Ld. Raym.
181. Little
wood v.
Smith.

Notwithstanding the Generality of the Words of the *21 Ja. 1. c. 16.* in any Court whatsoever, the Construction has been, that if an Action upon the Case for slanderous Words be brought in a Court, which cannot hold Plea to the Value of Forty Shillings, the Plaintiff is intitled to full Costs, notwithstanding the Damages found or assessed are under Forty Shillings ; for that this

Statute can only extend to Courts, wherein the Jury have Power to find or assess Damages to the Amount of Forty Shillings. The Consequence moreover, if the Construction were otherwise, would be, that full Costs could never be recovered in an Action upon the Case for slanderous Words, brought in a Court which cannot hold Plea to the Value of Forty Shillings.

The 21 *Ja. 1. c. 16.* does not extend to an Action upon the Case for slander-
ing a Title; the special Damage being in such Case the Gift of the Action.

*Cro. Car. 141.
Law v. Hor-
wood.*

If a special Damage be laid as a Con-
sequence of speaking Words not action-
able in themselves, the Plaintiff, in an
Action upon the Case for the Words
is intitled to full Costs, although the
Damages found or assessed are under
Forty Shillings; for that, as the special
Damage is in such Case the Gift of the
Action, it is not an Action upon the
Case for Words within the Meaning
of the 21 *Ja. 1. c. 16.*

*Ld. Raym.
831.
Brown v.
Gibbons.*

Cro. Car. 163.
Str. 645.
Ld. Raym.
1588.

If, in an Action upon the Case for Words in themselves actionable, a special Damage be laid as a substantive and independent Injury, and not as a Consequence of the Words; as if the Action be for Words importing a Charge of Felony, and for procuring the Plaintiff to be arrested and carried before a Justice of the Peace; the Plaintiff is intitled to full Costs, although the Damages found or assessed are under Forty Shillings; because the procuring of him to be arrested and carried before a Justice of the Peace is not, in such Case, laid merely in Aggravation of Damages, but as a substantive and independent Injury.

As the Determinations are contradictory upon the Point, whether the Plaintiff in an Action upon the Case for Words be intitled to full Costs, where a special Damage is not laid as a substantive and independent Injury, but as a Consequence of Words in themselves actionable, although the Damages found or assessed are under Forty Shillings, it will be proper to mention the principal Cases upon the Point.

In

In one Case, wherein the Plaintiff declared for Words in themselves actionable, by reason of the speaking of which he lost the Custom of *Y. S.* and *Y. N.* it was holden, that as the Damages found were under Forty Shillings, the Plaintiff should not have full Costs; and by the Court: If the Words, for the speaking of which an Action upon the Case is brought, be in themselves actionable, and the special Damage is laid merely in Aggravation of Damages, the Action is within the Meaning of the 21 *Ja. 1. c. 16.*

Ld. Raym.
1588
Burry v. Perry, Hil.
4 G. 2. in
K. B.
Str. 936. S.C.

In a subsequent Case, the Plaintiff declared for Words in themselves actionable, by reason of the speaking of which he lost the Custom of *Y. S.* and *Y. N.* and the Damages found were under Forty Shillings. It was insisted for the Plaintiff, that unless the special Damage did take this Case out of the 21 *Ja. 1. c. 16.* he would be without Remedy; for that no Declaration can be framed, for the special Damage occasioned by the speaking of Words in themselves actionable, without laying

Ca. Pr. in
C. B.
137. Denny
v. Wigg.
Mich. 10 C.
2.

the Words by the speaking of which it was occasioned. For the Defendant a Distinction was taken, between a special Damage laid as a Consequence of Words in themselves actionable, and a special Damage laid as a Consequence of Words not actionable in themselves: And a late Case in the Court of King's Bench was cited, wherein it had been determined, that as the Words were in themselves actionable, the Action for speaking them was, notwithstanding the laying of a special Damage, within the Meaning of the 21 *J. 1. c. 16.* It was holden; that the Plaintiff ought to have full Costs; and by the Court: There is no Foundation for the Distinction which has been taken.

2 Barn. 104.
Turner v.
Horton.
East. 16 G. 2.
in C. B.

In a still later Case, wherein the Plaintiff declared for Words in themselves actionable, by reason of the speaking of which *J. S.* had refused to deal with him, it was holden; that, as the Damages found were under Forty Shillings, the Plaintiff ought not to have full Costs; and by the Court: The true Distinction is; that where Words are
in

in themselves actionable without the special Damage, an Action for speaking them is within the Meaning of the 21 *Ja.* 1. *c.* 16. but that where Words are not in themselves actionable, it is not; because the Action is, in the latter Case, only maintainable on Account of the special Damage.

The same was holden in another Case some Years after; and it is in this Case said; that in the Case of *Turner v. Horton*, all the Cases upon the Point were taken into Consideration.

2 Barn. 124.
Tiffin v. Glass,
Hil. 25 G. 2.
in C. B.

In a very late Case, *Gould J. Blackstone J. and Nares J.* (*De Grey Ch. J.* being absent) agreed it to be a settled Point; that if Words are in themselves actionable, and the Damages found or assessed are under Forty Shillings, the Plaintiff is not entitled to more Costs than Damages, although a special Damage be alledged. But *Blackstone J.* added; that, although he held himself to be bound by the Cases, which had so settled the Point, the Determinations in those Cases were not, in his Opinion, founded upon good Reason.

MS. Rep.
Collier v.
Guillard,
East. 16 G. 3.
in C. B.

The

¹ Barn. 105.
Dover v. Ro-
binson.

The Plaintiff, in an Action upon the Case for Words, is not intitled to full Costs, although the Defendant have justified the speaking of the Words, and the Issue joined upon the Plea of Justification be found for the Plaintiff, unless Damages are found or assessed to the Amount of Forty Shillings; the Action, notwithstanding such Plea, being as much within the Meaning of the 21 *Ja.* 1. c. 16. as if Not guilty had been pleaded.

² Show 506.

Costs are not recoverable in an Action of *Scandalum Magnatum*; because this Action did not lie at the Common Law, and Costs are not given by the Statute upon which it is founded.

C H A P. IV.

In what Cases, the Right of a Plaintiff, under the Statute of *Gloucester*, c. 1. to Costs, is restrained by the 22 and 23 *Car. 2. c. 9.*

BY the 22 and 23 *Car. 2. c. 9.*
“ for Prevention of trivial and
“ vexatious Suits in Law, contrary to
“ the Intention of an Act made in the
“ three and fortieth Year of Queen *Eli-*
“ *zabeth*, for avoiding small and trifling
“ Suits, commenced in the Courts at
“ *Westminster*, it is further enacted, for
“ making the said Law effectual, that
“ in all Actions of Trespafs, Assault and
“ Battery, and other personal Actions,
“ wherein the Judge, at the Trial of
“ the Cause, shall not find and certify
“ under his Hand upon the Back of the
“ Record, that an Assault and Battery
“ was sufficiently proved by the Plain-
“ tiff against the Defendant, or that the
“ Free-

“ Freehold or Title of the Land men-
 “ tioned in the Declaration was chiefly
 “ in Question; the Plaintiff, in case
 “ the Jury shall find the Damages to
 “ be under the Value of Forty Shillings,
 “ shall not recover or obtain any more
 “ Costs of Suit, than the Damages so
 “ found shall amount unto: And if
 “ any more Costs in any such Action
 “ shall be awarded, the Judgment shall
 “ be void, and the Defendant is hereby
 “ acquitted of and from the same; and
 “ may have his Action against the Plain-
 “ tiff for such vexatious Suit, and re-
 “ cover his Damages and Costs of such
 “ his Suit in any of the said Courts of
 “ Record.”

By the 11 and 12 *W. 3. c. 9* it is en-
 acted, “ That the Clause of the 22 and
 “ 23 *Car. 2. c. 9.* and all the Powers
 “ and Provisions thereby, or by any
 “ other Law now in Force, made for
 “ Prevention of frivolous and vexatious
 “ Suits, commenced in the Courts at
 “ *Westminster*, shall be extended to all
 “ Suits, to be commenced or prose-
 “ cuted in the Court of Great Sessions
 “ for

“ for the Principality of *Wales*, the
 “ Court of Great Sessions for the Coun-
 “ ty Palatine of *Chester*, the Court of
 “ Common Pleas for the County Pa-
 “ latine of *Lancaster*, and the Court of
 “ Pleas for the County Palatine of *Dur-*
 “ *ham*.”

Notwithstanding the general Word *Trespass*, and the more general Words *other personal Actions* are contained in the 22 & 23 *Car. 2. c. 9.* the Construction almost ever since the making of that Statute has been, that it does only extend to Actions of *Trespass quare clausum fregit*, and Actions of Assault and Battery. The Reason assigned for this Construction is, that it was not the Intention of that Statute, to prevent a Plaintiff from recovering full Costs in any Action, except such wherein it was possible for the Judge, before whom the Cause was tried, to certify, that an Assault and Battery were sufficiently proved, or that the Freehold or Title of Land was chiefly in Question.

Raym. 48.
 195.
 Gilb. H. C.
 P. 263.
 2 Barn. 109.
 Str. 577.

A Plain-

A Plaintiff is not prevented, by the 22 & 23 *Car. 2. c. 9.* from recovering full Costs, although the Damages found upon a Writ of Enquiry do not amount to Forty Shillings: Because that Statute does not like the 21 *Ja. 2. c. 16.* extend to this Case; but is, on the contrary, expressly confined, to the Case of Damages found by the Jury at the Trial of a Cause.

2 Lev. 124.
4 Mod. 379.
L Raym. 395.

It has been frequently holden; that the 22 & 23 *Car. 2. c. 9.* does not extend to an Action which was brought in an inferior Court, and removed by the Defendant into one of the superior Courts, although the Damages found be under Forty Shillings, and the Judge do not certify: Because the Plaintiff would have been intitled to full Costs in the inferior Court, in case he had obtained a Verdict therein; and it is the Defendant's Fault, that the Case was not tried in that Court.

Ca. of Pr.
in C. B. 45.
Wilkinson v.
Swyer.

It has been holden; that the 22 & 23 *Car. 2. c. 9.* does only restrain the Court from awarding more Costs than Damages,

mages, in case the Damages found be under Forty Shillings, and the Judge do not certify; for that the Jury are not thereby restrained from finding what Costs they please, although they do not find Damages to the Amount of Forty Shillings.

In an Action of Assault and Battery the Jury found the Defendant guilty of the Assault only, with Damages under Forty Shillings. *Hales* Ch. J. before whom the Cause was tried, certified, that the Assault was sufficiently proved, in order to have the Opinion of the Court, whether the Plaintiff was prevented by the 22 & 23 *Car. 2. c. 9.* from having full Costs? It was holden, that he ought to have no more Costs than Damages; for that the Plaintiff, in an Action of Assault and Battery, is not since the making of that Statute intitled to full Costs, unless there be a Certificate, that the Battery was sufficiently proved.

2 Lev. 102.
Smith v.
Neefam.
Pasch. 26
Car. 2.

In an Action of Trespass the Plaintiff declared; that the Defendant made
an

3 Will. 319.
Batchelor v.
Bigg.

an Assault upon the Wife of the Plaintiff, and carnally knew her. Issue being joined upon the Plea of Not guilty, and there being a Verdict for the Plaintiff, with One Pound Eleven Shillings and Sixpence Damages, the Question was, whether, as there was no Certificate, the Plaintiff ought to have full Costs? It was holden that he ought; and by the Court: The Gift of this Action is the criminal Conversation, and not the Assault.

Ca. Pr. in
C. B. 86.
Dixie v. So-
merfield,
Trin. G. 2.

In an Action of Trespass *quare clausum fregit*, in which the Plaintiff declared for breaking his Close, and digging up, and throwing down the Pales and Gates thereupon erected and affixed. A Verdict being found for the Plaintiff, with Damages under Forty Shillings, a Question arose, whether, as the Judge had not certified, he ought to have full Costs? It was holden that he ought not; and by the Court: As the Freehold might have come into Question, a Certificate was necessary to entitle the Plaintiff to full Costs.

In

In an Action of Trespass *quare clausum fregit*, the Plaintiff declared for the breaking and entering of his House, and for the breaking of a Door of the House, and there was a general Verdict for him, with Damages under Forty Shillings. As the Judge had not certified, it was holden; that the Plaintiff ought to have no more Costs than Damages; because the Door, which was affixed to the House, is not to be considered as a personal Chattle.

1 Barn. 93.
Tomlinson v.
White, East.
8 G. 2.

In an Action of Trespass *quare clausum fregit*, for fixing Stakes upon the Plaintiff's Ground, it was holden; that a Certificate was necessary to entitle the Plaintiff to full Costs.

2 Vent. 48.
Anon.

In an Action of Trespass *quare clausum fregit*, for building a Wall upon the Land of the Plaintiff, the Defendant pleaded the general Issue, upon which there was a Verdict for the Plaintiff, with Damages under Forty Shillings. It became afterwards a Question, whether, as the Judge had not certified, the Plaintiff ought to have full Costs? As

Ld. Raym.
1444.
Higgins v.
Jennings.

D

it

it was determined upon another Point in the Case, that the Plaintiff ought to have full Costs, *Fortescue J.* and *Probyn J.* gave no Opinion as to this Question : But *Raymond Ch. J.* and *Reynolds J.* were of Opinion, that the Plaintiff ought not to have full Costs ; it appearing to them probable, as the Judge had not certified, that the Defendant did not at the Trial of the Cause insist upon a Right to build the Wall.

2 Barn. 99.
Ibbotson v.
Brown.

In an Action of Trespass *quare clausum fregit*, the Defendant justified. The Plaintiff made a new Assignment, to which the Defendant pleaded the general Issue. A Verdict being found for the Plaintiff, with Damages under Forty Shillings, the Question, as the Judge had not certified, was, whether he ought to have full Costs ? It was holden that he ought not ; and by the Court : There is, in reality, no special Plea in this Case ; for, as the new Assignment amounted to a new Declaration, the Defendant was at Liberty to give a new Answer thereto ; and, as he thought proper to plead Not guilty, the special Plea

Plea is as much out of the Case as if it had never been pleaded.

It was said by *Lee J.* that a Certificate is necessary to the entitling of a Plaintiff to full Costs in some Actions of Trespass *quare clausum fregit*, notwithstanding an Issue upon some Matter pleaded specially be found for him ; and he cited the Case of *Philpot v. Jones*, *Hil. 1 G. 1.* In this Case, which was an Action of Trespass *quare clausum fregit*, for breaking the Plaintiff's House, the Defendant justified entering as Bailiff under a Process. The Plaintiff replied ; that the Doors of the House were shut, and thereupon Issue was joined. A Verdict being for the Plaintiff, with Damages under Forty Shillings, it was holden ; that, as the Judge had not certified, he ought to have no more Costs than Damages.

2 Barnard
277.
Walther v.
Smith.

If this be so, that a Certificate is necessary to the entitling of a Plaintiff to full Costs, in some Actions of Trespass *quare clausum fregit*, although an Issue upon some Matter specially pleaded be

2 Ventr. 180,
15.

found for him, it would of course follow, and it has in Fact been so holden; that a Certificate is necessary to entitle a Plaintiff to full Costs, in every Case wherein such Issue is found against him, although there be a Verdict for him upon the general Issue; because the Case is exactly the same, as if only the general Issue had been pleaded.

A Certificate upon the 22 & 23 *Car. 2. c. 9.* is not necessary to entitle a Plaintiff in an Action of Trespass *quare clausum fregit* to full Costs, if it appear from the Pleadings; that the Title was in Question, in an Issue which has been found for him; because a Certificate, which could say no more than what appears upon the Record, would in such Case be quite nugatory.

2 Lev. 234.
After v. Finch.

In an Action of Trespass *quare clausum fregit*, the Defendant justified under a Right of Way, and the Plaintiff replied *extra viam*. A Verdict being found for the Plaintiff, with Damages under Forty Shillings, it was holden; that the Plaintiff ought to have full Costs; and
by

by the Court : Wherever the Title appears upon the Record to be in Question, the Case is not within the Meaning of the 22 & 23 Car. 2. c. 9. In this Case the Extent of the Way, namely, whether it was ten or twenty Feet in Breadth, and consequently the Title thereto, was in Question.

In an Action of Trespass *quare clausum fregit*, the Defendant pleaded Not guilty, and a Justification, as to breaking and entering the Close, and treading down the Grass, under a Right of Way. To the latter Plea the Plaintiff replied *extra viam*, and the Issues joined upon both Pleas were found for him, with Damages under Forty Shillings. It was holden ; that the Plaintiff, notwithstanding the Judge had not certified, ought to have full Costs ; because, upon the Trial of the Issue upon the latter Plea, the Breadth of the Way, and consequently the Title thereto, was in Question. In this Case the Authority of *Affer v. Finch*, 2 Lev. 234. was recognised by the Court.

Lord Raym.
1444. Hig-
gins v. Jen-
nings.
Str. 726. S. C.

Ld. Raym. 76.
Kempster v.
Deacon.

In an Action of Trespass *quare clausum fregit*, in which Issue was joined upon the Plea of Not guilty, a View was ordered to be had. A Verdict being found for the Plaintiff, with Damages under Forty Shillings, a Question arose, whether, as the Judge had not certified, the Plaintiff ought to have full Costs? It was holden that he ought; and by the Court: It appears upon the Record, that a View was ordered; and, as a View could not have been ordered, unless the Title were in Question, the ordering of a View amounts to a Certificate, that the Title was in Question.

Gilb. Eq.
Rep. 199
3 Mod. 40.

It is laid down in divers Cases, that if, in an Action of Trespass *quare clausum fregit*, there be one Count for a Trespass upon Land, and another for carrying away or doing an Injury to a personal Chattle, and a general Verdict be found for the Plaintiff, he is entitled to full Costs, although the Damages found are under Forty Shillings, and the Judge have not certified: Because, as a Title to Freehold could not come in Question upon the second Count, it was not in
the

the Power of the Judge to certify there-upon.

The Doctrine of these Cases is recognized in a very modern Case, wherein there was one Count for a Trespass upon Land, and another for taking and carrying away a Hog. A general Verdict being found for the Plaintiff, with Damages under Forty Shillings, and the Judge not having certified, the Question was, if the Plaintiff ought to have full Costs? It was holden that he ought; and by *Lee Ch. J.* there could not in this Case be a Certificate upon the second Count; and it has been frequently holden; that if there be one Count in a Declaration, upon which the Judge could not certify, and the Issue thereupon joined be found for the Plaintiff, he is entitled to full Costs, this not being a Case within the 22 & 23 *Car. 2. c. 9.*

MS. Rep.
Knightly v.
Buxton.
Hil. 23 G. 2.
in K. B.

It seems to be settled; that if, in an Action of Trespass *quare clausum fregit*, an *Asportation* be charged, in the same Count wherein a Trespass upon a Land

D. 4

is

is charged, and there be a general Verdict for the Plaintiff, he is entitled to full Costs, although the Damages found are under the Value of Forty Shillings, and the Judge have not certified : But in as much as the Cases differ, as to what does amount to an *Asportation*, sufficient to entitle the Plaintiff to full Costs, it will be proper to mention the principal Cases upon the Point.

2 Ventr. 215.
Anon.
Mich. 2W.3

It is in one Case laid down ; that the least removing of a Thing severed from the Freehold, although it be not carried off the Premises, amounts to an *Asportavit*, sufficient to entitle a Plaintiff in an Action of Trespass *quare clausum fregit* to full Costs ; although the Damages found are under Forty Shillings, and the Judge have not certified.

Skin. 66.
Blickley v.
Fry. Mich. 8
W. 3.

It is in another Case laid down ; that a carrying off the Premises is not in such Case necessary to entitle a Plaintiff to full Costs.

Str. 633.
Anon. Trin.
11 G. 1.

In another Case, wherein the Question was, whether the breaking down, tearing

ing

ing up and spoiling of five Poles, erected and affixed in the Plaintiff's Close, did amount to an *Asportavit*? It was holden that it did not; for that an *Asportavit* means an entire carrying away. The Court did in this Case express a Dissatisfaction, with what is laid down in 2 *Ventr.* 215. and in Support of their Opinion in the present Case relied much upon the Authority of the Case of *Franklin v. Holland*, Hil. 8 W. 3. In this Case, which was a Trespass for breaking the Plaintiff's Close, and pulling up and throwing down three Perches of Hedge there erected, it was insisted for the Plaintiff; that such pulling up and throwing down could not be without some Degree of Asportation: But it was holden, that an *Asportavit* means an entire carrying away.

In a subsequent Case, which was Trespass *quare clausum fregit* for breaking the Plaintiff's Close, and pulling up and throwing down the Pales and Gates thereupon erected and affixed, it was holden; that, as the Damages found were under Forty Shillings, and the

Ca. Pr. in C.
B. 86. Dixie
v. Somer-
field. Trin.
5 G. 2.

Judge had not certified, the Plaintiff ought to have full Costs.

It seems to be settled ; that if, in an Action of Trespass *quare clausum fregit*, a substantive and independent Injury to a personal Chattel be charged, in the same Count wherein a Trespass upon Land is charged, and there be a general Verdict for the Plaintiff, he is entitled to full Costs, although the Damages found are under Forty Shillings, and the Judge have not certified.

But in as much as it is not settled, what does amount to such a substantive and independent Injury, as does in such Case entitle a Plaintiff to full Costs, it will be proper to mention the principal Cases upon the Point.

Str. 102.
Anderson v.
Buckton.
Trin. 5 G. 1.

In one Case, the Plaintiff declared for the Entry of some diseased Cattle, belonging to the Defendant, into the Close of the Plaintiff ; *per quod* some of the Plaintiff's Cattle were infected. A general Verdict being found for the Plaintiff, with Damages under Forty Shillings,

lings, and the Judge not having certified, the Question was, whether the Plaintiff ought to have full Costs? *Pratt* Ch. J. *Powys* J. and *Fortescue* J. were of Opinion that he ought; and by them: The consequential Damage is a Matter for which the Plaintiff might have had a distinct Satisfaction; it being like the Case of an Action brought by a Master for the Battery of his Servant, *per quod* he lost the Service of the Servant, which is certainly not within the Meaning of the 22 & 23 Car. 2 c. 9. The true distinction is; that where the Matter, laid in Aggravation of Damages, would have entitled the Plaintiff to a distinct Satisfaction, he ought to have full Costs, notwithstanding such Matter is laid in Aggravation of Damages. *Asportation* of Trees is a Ground for an Action of Trover; yet it may be laid in Aggravation of Damages in an Action of Trespass. If a Person enter my Close, and chase my Cattle, the chasing of the Cattle is a distinct Wrong; yet it may be laid as a Matter of Aggravation. *Eyre* J. was of a contrary Opinion;

nion ; because, as he said, which was denied by the other Justices, a Recovery in this Action could not be pleadable in Barr to an Action upon the Case for the special Injury.

Str. 551.
Thompson v.
Berry.
East. 9 G. 1.

In another Case, wherein the Plaintiff declared for breaking and entering his Close, and chasing his Bull, there was a general Verdict for the Plaintiff, with Damages under Forty Shillings. As the Judge had not certified, the Question was, whether the Plaintiff ought to have full Costs ? It was holden that he ought ; and by the Court : The 22 & 23 Car. 2. c. 9. extends only to Actions of Trespass, in which a Title to Freehold might have come in Question : But a Title to Freehold could not have come in Question, as to that Part of this Case, which relates to the chasing of the Bull.

Str. 645.
Blunt v.
Mither.
Mich. 12 G. 1.

In another Case, the Plaintiff declared for breaking and entering his House, and keeping him out thereof for the Space of one Month, *per quod* he was put to a great Expence in order to re-
gain

gain the Possession, and in the mean Time lost the Profit and Use of the House. A general Verdict being found for the Plaintiff, with Damages under Forty Shillings, and there being no Certificate, it was holden ; that the Plaintiff ought not to have full Costs ; and by the Court : The special Damage, which comes under the *per quod*, is laid merely in Aggravation of Damages. The Residue is a plain Trespass *quare clausum fregit*, as to which the Title might very well have come in Question ; and if so, there might have been a Certificate, which not being granted, the Plaintiff is not entitled to any more Costs than Damages.

In another Case the Plaintiff declared in one Count for breaking and locking up his House, and taking, and detaining certain of his Goods therein for the Space of a Month. The Verdict being general, the Damages found being under Forty Shillings, and the Judge not having certified, it was holden, that the Plaintiff ought not to have full Costs : And by *Gilbert* Ch. B. although
I doubt-

Gilb. Eq.
Rep. 199.
Reeve v.
Butler.
Hil. 12 G. 1.

I doubted somewhat at first, I am now clearly of Opinion with my Brethren ; that the Plaintiff ought not to have more Costs than Damages. As there is not in this Case a separate Count for taking and detaining the Goods ; but this is connected with the breaking and locking up of the House, as to which the Title might have come in Question, it must be considered as laid merely in Aggravation of Damages, and not as a substantive and independent Injury. Some Stress is, however, in this Case laid upon an *Asportavit* not being charged, and it is said ; that a detaining is not alone sufficient to warrant an Action of Trespass *vi et armis*.

1 Barn 91.
Arnold v.
Thompson.
East. 7 G. 2.

In another Case, the Charge in the Declaration was breaking and entering the Close of the Plaintiff, and chasing his Sheep. A general Verdict being found for the Plaintiff, with Damages under Forty Shillings, and there being no Certificate, a Question arose, whether the Plaintiff ought to have full Costs ? It was holden that he ought ; and by the Court : Wherever an Injury has
1 been

been done to a personal Chattle, the Plaintiff is entitled to full Costs.

In another Case, wherein the Plaintiff declared for an Assault and Battery, and tearing his Cloaths, there was a general Verdict for the Plaintiff, with Damages under Forty Shillings. It was holden, although the Judge had not certified; that the Plaintiff ought to have full Costs.

1 Barn. 92.
Caruthers v.
Lamb.
Mich. 8 G. 2.

In another Case, the Plaintiff declared for an Assault upon him in the Parish of *A.* and for taking and carrying away the Coals of the Plaintiff, and for spoiling other his Coals there, and for taking and carrying away other Goods and Chattles belonging to the Plaintiff. The Defendant was found Not guilty as to the taking and carrying away of the Goods and Chattles: But as to the Residue there was a Verdict for the Plaintiff, with Damages under Forty Shillings. There being no Certificate that the Battery was sufficiently proved, or that the Title came in Question. A Question arose, whether the Plaintiff ought to have

2 Barn. 108.
Milburn v.
Read, Trin.
17 G. 2.

have full Costs? It was holden that he ought; and by *Burnet J.* as Part of what is found for the Plaintiff, namely, the spoiling and carrying away of his Coals, is not within the Meaning of the 22 & 23 *Car. 2. c. 9.* he is entitled to full Costs, notwithstanding he has joined in the same Action an Assault and Battery, which is within the Meaning of that Statute. He observed likewise; that, as the Trespass is laid generally in the Parish of *A.* and not in any particular Close of the Plaintiff, a Title to Freehold could not have been in Question.

2 Barn. 127.
Gregory v.
Dormer.
Mich. 26 G.
2.

In another Case, the Plaintiff declared for a Trespass with Cattle in the Plaintiff's Close, and bruising, pressing and spoiling his Apples there found. The Verdict being general, the Damages being under Forty Shillings, and there being no Certificate, it was holden; that the Plaintiff ought to have no more Costs than Damages; and by the Court: The Apples, although laid to be there found, might be growing.

In

In another Case, the Plaintiff declared in the same Count ; that the Defendant assaulted and beat him, and threw him down upon the Ground, which was covered with Water, and *thereby* damaged his Cloaths. A general Verdict being found for the Plaintiff, with Damages under Forty Shillings ; the Question was, whether, as the Judge had not certified, the Plaintiff ought to have any more Costs than Damages ? It was holden that he ought not ; and by *Lee Ch. J.* the Damaging of the Cloaths is charged as a Consequence of the Assault and Battery, and cannot be so separated therefrom, as to make it an independent Injury. And by *Dennison J.* the Word *thereby* means the same as the Words *per quod* ; and it has been frequently holden ; that a Plaintiff is not, in such Case, entitled to full Costs, for the Injury to the personal Chattle, unless Damages are found to the amount of Forty Shillings, or there be a Certificate. If it had been alledged ; that the Defendant threw Water upon the Plaintiff's Cloaths, and that the Cloaths were thereby damaged, the Plaintiff would

E

have

Sayer 91.
Thompson v.
Adthead,
Trin. 27G. 2.

have been entitled to full Costs ; because the Damaging of the Cloaths would, in that Case, have been an independent Injury to a personal Chattle.

MS. Rep.
Appleton v.
Smith, Hil.
2 G. 3. in
K. B.

In another Case, the Charge in the Declaration was ; that the Defendant broke and entered the Dwelling-house of the Plaintiff, and made a Noise, an Affray, and a Disturbance therein ; and continued so to do, until the Plaintiff, and two other Persons, joined in giving a promissory Note to the Defendant for the Payment of Sixteen Pounds Seventeen Shillings. A general Verdict being found for the Plaintiff, with Damages under Forty Shillings, and there being no Certificate, the Question was, whether the Plaintiff ought to have full Costs ? It was holden that he ought not ; and by the Court : The whole Charge in the Declaration, except the breaking and entering of the House, is in Aggravation of Damages. It is very certain ; that upon that Part of the Charge, which relates to the breaking and entering of the House, the Title might have been in Question ; and consequently,

frequently, as there is no Certificate that it was in Question, the Plaintiff is not entitled to any more Costs than Damages.

It does not appear, from the Reports of several of the Cases last mentioned; that the Charge of the Injury to the personal Chattle was contained in the same Count, wherein the Trespass upon Land, or the Assault and Battery, was charged: But this must have been the Case, otherwise no Question concerning Costs could have arisen; it being clear, from the Cases before mentioned; that Ante, p. 38, 39.
if in an Action of Trespass *quare clausum fregit*, a Trespass upon Land be charged in one Count, and an Injury to a personal Chattel in another; or in an Action of Assault and Battery, an Assault and Battery be charged in one Count, and an Injury to a personal Chattle in another; and there be a general Verdict for the Plaintiff, he is entitled to full Costs, although the Damages found are under Forty Shillings, and the Judge have not certified.

2 Ventr. 180,
195.
Ca. Pr. in
C. P. 118.

If in an Action of Trespass *quare clausum fregit*, there be a Verdict for the Defendant, as to that Part of the Case wherein the Plaintiff charges an Injury to a personal Chattle, and a Verdict for the Plaintiff as to the Residue, with Damages under Forty Shillings, the Plaintiff is entitled to no more Costs than Damages, although the Injury to the personal Chattle be charged in a separate Count, unless the Judge have certified; because it is in such Case found, that no Injury was done to the personal Chattle, and, as to what is found for the Plaintiff, the Title might have come in Question, and consequently there might have been a Certificate.

C H A P. V.

In what Cases, the Restraint, put upon the Right of a Plaintiff to Costs by the 22 & 23 *Car. 2. c. 9.* is taken off by the 4 & 5 *W. & M. c. 23.*

BY the 4 & 5 *W. & M. c. 23.* after reciting; that great Mischiefs do ensue by inferior Tradesmen, Apprentices, and other dissolute Persons, neglecting their Trades and Employments, who follow Hunting, Fishing and other Game, to the Ruin of themselves and Damage of their Neighbours, it is enacted: “ That if any such Person shall
 “ presume to hunt, hawk, fish or fowl,
 “ unless in Company with the Master
 “ of such Apprentice, duly qualified by
 “ Law, such Person shall be subject to
 “ the Penalties of this Act, and may be
 “ sued or prosecuted for his wilful Tres-
 “ pass, in such his coming on any Per-
 “ son’s Land, and if found guilty there-
 E 3 of,

“ of, the Plaintiff shall not only recover
 “ his Damages thereby sustained, but
 “ his full Costs of Suit; any Law to the
 “ contrary notwithstanding.”

Com. 26.
 Bennet v.
 Talboys.

It has been holden ; that a Clothier is an inferior Tradesman within the Meaning of the 4 & 5 *W. & M. c. 23.* and it is said ; that the Words inferior Tradesmen in that Statute extend to every Tradesman who is not qualified to kill Game.

MS. Rep.
 Buxton v.
 Mingey.
 Trin. 30 G. 2.
 in C. B.

In a Case reserved, in an Action of Trespass *quare clausum fregit*, it was stated ; that the Defendant was a Surgeon and Apothecary, and not qualified to kill Game ; that he, with divers other Persons, not qualified to kill Game, hunted with a Person qualified to kill Game, and committed a Trespass in the Plaintiff's Close ; and that there was a Verdict for the Plaintiff, with One Shilling Damages and Forty Shillings Costs. The Question was, whether the Defendant is to be deemed an inferior Tradesman, within the Meaning of the 4 & 5 *W. & M. c. 23.* ? As the Justices differed

ferred in Opinion, they gave their Opinions *seriatim* ; and by *Noel J.* notwithstanding what is laid down in the Case of *Bennet v. Talboys*, I cannot think, that by the Words inferior Tradesmen in the 4 & 5 *W. & M. c. 23.* every unqualified Tradesman is intended ; for if that should be the Construction, those Words might extend to a Merchant worth One Hundred Thousand Pounds. As that Statute seems to me, to be calculated only for preventing inferior Tradesmen of a dissolute Character from hunting, I am of Opinion, that the present Defendant is not within the Meaning thereof. And by *Bathurst J.* the Question, who is an inferior Tradesman within the Meaning of the 4 & 5 *W. & M. c. 23.* is, in my Opinion, a Question of Law, and consequently proper for the Determination of the Court ; and the Construction of the Words inferior Tradesmen, in the Case of *Bennet v. Talboys*, appears to me very reasonable ; in as much as it seems consistent with the whole Tenor of that Statute. In an antecedent Clause thereof, Power is given to search the Houses of all suspected Persons, how much so-

ever they may be worth, not qualified to kill Game; and in the Clause, upon which the present Question arises, an Apprentice is forbidden to hunt, unless he be in Company with his Master, and such Master be duly qualified: From whence it may be inferred; that a Master unqualified is not to hunt. Upon the whole, I cannot help being of Opinion, that the present Defendant is an inferior Tradesman within the Meaning of the 4 & 5 *W. & M. c. 23*. And by *Clive J.* I am of Opinion, that the present Defendant is an inferior Tradesman within the Meaning of the 4 & 5 *W. & M. c. 23*. The Court ought, as I conceive, to draw some Line, in construing the Words inferior Tradesmen in that Statute; for it would be very difficult, to ascertain in every particular Case, whether the Degree of Inferiority be sufficient to bring a Tradesman within the Meaning thereof; and there cannot, as I think, be a more proper Line drawn, than to hold, that they extend to every Tradesman not qualified to kill the Game. And by *Willes Ch. J.* whenever any Part of a Statute is, as in the present

sent Case, penned in obscure Terms, it is by no Means necessary, for the Court to draw a Line in the Construction of such Part ; it being always sufficient, to determine whether the Case under Consideration be within the Meaning of the Statute. It was not many Years ago unanimously agreed by the Judges, who met to consider of a Case, referred to them upon the Statute against Sheep-stealing ; that it was not necessary to draw a Line, as to the Meaning of the Words *other Cattle*, contained in that Statute ; for that it was sufficient to determine, whether those Words did extend to the Case referred to them. The Case of *Bennet v. Talboys* is by no Means a conclusive Authority ; for it does not appear, from the Report thereof, to have been fully argued. It seems to me, that the Words inferior Tradesmen, as they stand connected with other Words in the 4 & 5 *W. & M. c. 23.* mean Tradesmen who are dissolute, and follow hunting, to the Ruin of themselves and Damage of their Neighbours. I think likewise ; that it was a Matter proper for the Jury to have determined, whether
the

the present Defendant be a Tradesman of this Kind ; and as it is not stated, that he is such a Tradesman, the Court ought not to presume it. Upon the Whole, I am of Opinion, that the present Defendant is not an inferior Tradesman within the Meaning of the 4 & 5 *W. & M. c. 23*. The Court being thus equally divided, no Rule was made ; and consequently, as the Damages were under Forty Shillings, and the Judge had not certified, the *Postea* was ordered to remain in Court.

CHAP. VI.

In what Cases the Restraint, put upon the Right of a Plaintiff to Costs by the 22 & 23 Car. 2. c. 9. may be taken off by a Certificate upon the 8 & 9 W. 3. c. 11.

IT has been shewn; that, according Ante, p. 29. to the Construction of the 22 & 23 Car. 2. c. 9. the Judge could not certify in any Action of Trespass *quare clausum fregit*, unless the Freehold or Title to the Land were in Question. The Consequence of this Construction was; that the Plaintiff, in an Action of Trespass *quare clausum fregit*, could not recover full Costs for any Trespass, how wilful and malicious soever it was, if the Damages found were under Forty Shillings, unless the Defendant did insist upon a Title to the Land. The Inconvenience of this having been found very great,

great, it is by the 8 & 9 *W. 3. c. 11.* enacted : “ That in all Actions of Trespass, to be commenced or prosecuted in any of his Majesty’s Courts of Record at *Westminster*, wherein at the Trial of the Cause it shall appear, and be certified by the Judge, under his Hand upon the Back of the Record, that the Trespass, upon which any Defendant shall be found guilty, was wilful and malicious, the Plaintiff shall recover not only his Damages, but his full Costs of Suit; any former Law to the contrary notwithstanding.”

6 Mod. 153.
Dove v.
Smith.

In an Action of Trespass *quare clausum fregit*, the Plaintiff declared for the breaking of his Close and the treading down of his Grass. It appeared in Evidence; that the Plaintiff’s Close adjoined to the Back Part of the Defendant’s House, which was a publick House; that the Defendant did sometimes set a Table for his Guests, and serve them in the Close; and that he, in Company with others, did frequently walk therein, and sometimes shoot with Bows and Arrows.

Arrows. It was said by *Holt* Ch. J. before whom the Cause was tried, that the Plaintiff could only recover for the Damages proved to be done; because the Jury must be governed by Evidence: But he added; that if the Jury should find Damages under Forty Shillings, he would certify, in order to entitle the Plaintiff to full Costs; for that the Trespass was in this Case wilful and malicious, within the Meaning of the 8 & 9 *W. 3. c. 11.* which extends to every Trespass that is not accidental as well as small.

A Certificate not having been obtained upon the 8 & 9 *W. 3. c. 11.* at the Trial of an Action of Trespass, the Judge, before whom the Cause was tried, did after the Trial certify upon that Statute. The Certificate was holden to be void, as not being warranted by that Statute; the granting of a Certificate being thereby confined to the Time of trying a Cause.

2 Willf. 21.
Ford v. Par.

C H A P. VII.

In what Cases, the Right of a Plaintiff, under the Statute of *Gloucester*, c. 1. to Costs, is taken away, and he is obliged to pay Costs.

BY the 3 *Ja.* 1. c. 15. after reciting ;
 that by an Act made in the first
 Year of the Reign of that King, entitled
 an Act for the Recovery of small Debts
 and relieving poor Debtors in *London*,
 the Court of Requests in that City,
 commonly called the Court of Conscience,
 was more perfectly established,
 it is enacted : “ That if in any Action
 “ of Debt, or Action upon the Case,
 “ upon an *Assumpsit*, for the Recovery
 “ of any Debt, to be sued or prosecuted
 “ ed against any Person, being a Vic-
 “ tualler, Tradesman or labouring Man,
 “ inhabiting in the City of *London* or
 “ the Liberties thereof, in any of the
 “ King’s Courts at *Westminster*, or else-
 “ where

“ where out of the Court of Requests
 “ in the City of *London*, commonly call-
 “ ed the Court of Conscience, it shall
 “ appear to the Judge or Judges of the
 “ Court, where such Action shall be
 “ sued or prosecuted ; that the Debt, to
 “ be recovered by the Plaintiff in such
 “ Action, doth not amount to the Sum
 “ of Forty Shillings ; and the Defen-
 “ dant in such Action shall prove, ei-
 “ ther by sufficient Testimony, or by
 “ his own Oath, to be allowed by the
 “ Judge or Judges of the Court where
 “ such Action shall depend ; that, at
 “ the Time of commencing such Ac-
 “ tion, the Defendant was inhabiting
 “ and resant in the City of *London* or
 “ the Liberties thereof, the said Judge
 “ or Judges shall not allow the Plaintiff
 “ any Costs of Suit ; but shall award,
 “ that the Plaintiff shall pay so much
 “ ordinary Costs to the Defendant, as
 “ the Defendant shall prove before the
 “ said Judge or Judges it hath cost him
 “ in Defence of the said Suit.”

Since the making of the 3 *Ja.* 1.
c. 15. Courts of Requests or Consci-
 ence

ence have been erected by Statutes in several Cities, Towns corporate and other Places, for the Recovery of small Debts in the respective Cities, Towns corporate and other Places.

It is sufficient to observe, without reciting the Clause of any Statute by which the Provision is made ; that by every Statute, for erecting a Court of Requests or Conscience, it is provided ; that, in case a Plaintiff bring an Action, which, pursuant to the Direction of a Statute, ought to be brought in a Court of Requests, in any of the King's Courts at *Westminster*, or elsewhere out of the Court of Requests, he shall pay Costs to the Defendant.

MS. Rep.
Weston v.
Donnelly,
Hil. 29 G. 2.
in K. B.

Upon a Rule to shew Cause, why a Suggestion should not be entered upon the Record, that no more than Thirty Shillings was recovered by the Verdict ; and that, at the Time of commencing the Suit, the Defendant was resident in the Borough of *Southwark*, within the Jurisdiction of the Court of Requests erected by the 22 G. 2. c. 47. in order

to entitle the Defendant to Costs ; the Question was, whether, as the Debt alledged in the Declaration was above Forty Shillings, the Plaintiff ought to pay Costs, although there was a Verdict for only Thirty Shillings ? It was holden that he ought ; and by the Court : The Words of the 22 G. 2. c. 47. which are, “ That unless the Debt to “ be recovered do amount to Forty “ Shillings at the least, the Plaintiff “ shall pay Costs to the Defendant,” are the same as are contained in the 3 Ja. 1. c. 15. for the Recovery of small Debts within the City of *London* and Liberties thereof ; yet the Construction of that Statute has constantly been, that if a Plaintiff, who sues a Person, inhabiting or resiant within that City or the Liberties thereof, in any other Court than the Court of Requests in that City, and do not obtain a Verdict to the Amount of Forty Shillings, he must pay Costs to the Defendant.

In an Action of *Assumpsit*, for Goods sold and delivered, the Value of the Goods was proved to be Forty Three
F Shil-

MS. Rep.
Gosv. Fisher,
Hil 10 G. 3.
in C. B.

Shillings : But Four Shillings being given in Evidence by way of Set-off, there was a Verdict for only Thirty-nine Shillings. The Court was moved, for a Rule to enter a Suggestion upon the Record ; that the Defendant, at the Time of commencing the Action, resided in the County of *Middlesex*, and was liable to be summoned to the County Court ; in order to entitle the Defendant to double Costs, under the 23 G. 2. c. 33. by which double Costs are given to the Defendant, in an Action of Debt, or an Action of *Assumpsit*, in Case the Jury shall find Damages under Forty Shillings, unless the Judge shall in open Court certify on the Back of the Record, that the Freehold or Title to the Plaintiff's Land principally came in Question ; or that an Act of Bankruptcy principally came in Question. No Rule was made ; and by *Wilmot* Ch. J. a Set-off is not like Payment ; for if Payment be not given in Evidence, by way of Deduction, an Action does not afterwards lie for the Money paid : But if a mutual Debt be not given in Evidence, by way of Set-off, an Action does afterwards

wards lie for the Debt. The Plaintiff could not maintain an Action in the County Court for Forty-three Shillings; and if he had himself deducted the Debt Four Shillings, and brought an Action in that Court for Thirty-nine Shillings, the Defendant might have given in Evidence the Debt of Four Shillings, by way of Set-off: In which Case, as the Plaintiff could not have replied in Evidence, that he had himself deducted the Four Shillings, he would have been a Loser of Four Shillings.

A Verdict having been found, with Damages under Forty Shillings, in an Action which ought, pursuant to the Direction of the 3 *Ja.* 1. *c.* 15. to have been brought in the Court of Requests in the City of *London*; a Rule was made absolute, to enter the proper Suggestion upon the Record, in order to entitle the Defendant to Costs. A Question arising afterwards, whether the Costs of the Application for Leave to enter the Suggestion ought to be allowed? These not being, strictly speaking, Costs of the Defence of the Suit, it was holden; that

Str. 1120.
Hickman v.
Colly.

these Costs, as well as the Costs of the Trial and the former Proceedings, ought to be allowed.

Str. 46.
Brampton v.
Crabb.

It has been holden ; that if an Action which, pursuant to the Direction of an Act of Parliament, ought to have been brought in a Court of Requests or Conscience, be brought in another Court, and Damages be assessed after Judgment by Default, a Suggestion cannot be entered upon the Record, in order to entitle the Defendant to Costs, although the Damages found be under Forty Shillings ; the Defendant being out of Court, as to all Purposes except having Judgment against him.

C H A P. VIII.

Of the Right of a Defendant to Costs, in case the Plaintiff be nonsuited, or there be a Verdict for the Defendant.

BY the Statute of *Marleberge, c. 6.* Costs are given to the Defendant in a Writ of Right Ward, in Case the Suit be malicious.

No Provision is made by the Statute of *Gloucester* for the Costs of a Defendant in any Case. The best Reason perhaps, which can be assigned for this, is ; that the Costs of a Defendant were at the Time of making that Statute so inconsiderable, as not to be an Object worthy the Attention of the Legislature. If the giving of Costs to a Defendant had been therein omitted by Accident, an Opportunity must soon after have been taken of giving them : Whereas it is in Fact true, that no Provision was

made for the Costs of a Defendant, from the Time of making the Statute of *Gloucester*, until the Twenty-third Year of the Reign of *Henry* the Eighth, except in an Action of Replevin, and a Suit upon a Writ of Error; in the former of which Cases, the Defendant is to be considered as an Actor, and in the latter, the Provision is virtually for the Plaintiff in the original Action; it being for the Costs he is put to on account of the Writ of Error.

By the 23 *H. 8. c. 15.* it is enacted:
 “ That if, in any Action therein men-
 “ tioned, the Plaintiff, after the Ap-
 “ pearance of the Defendant, be non-
 “ suited, or a Verdict pass against him,
 “ the Defendant shall have Judgment
 “ to recover his Costs against the Plain-
 “ tiff, to be assessed and taxed by the
 “ Discretion of the Judge or Judges of
 “ the Court, where such Action shall be
 “ commenced or sued, and shall have
 “ such Process and Execution, for the
 “ Recovery of his Costs against the
 “ Plaintiff, as the Plaintiff should or
 “ might have had against the Defen-
 “ dant,

“ dant, in case Judgment had been given for the Plaintiff.”

By the 24 *H. 8. c. 8.* it is enacted :
 “ That albeit the Plaintiff shall be nonsuited in any Action, Suit, Bill or Complaint, to be commenced or sued to the Use of our Sovereign Lord the King, his Heirs or Successors, Kings of *England* ; or that any Verdict shall pass against any Plaintiff in any Action, Suit, Bill or Complaint, to be sued to the King’s Use, the Defendant shall not recover any Costs against such Plaintiff ; any Act, Statute or Thing to the contrary notwithstanding.”

It is not necessary to give an Account of the particular Actions mentioned in the 23 *H. 8. c. 15.* Because the Provisions thereby made, for the Costs of Defendants in those Actions, are by the 4 *Ja. 1. c. 3.* extended to every Action, in which a Plaintiff or Demandant may recover Costs.

By the 4 *Ja. 1. c. 3.* after reciting ; that the 23 *H. 8. c. 15.* has been a very

Costs.

beneficial Law to the Commonwealth ;
 and that many have been thereby discouraged from bringing vexatious Actions, by Reason they were to make Recompence to the Parties unjustly vexed, it is enacted : “ That if any
 “ Person shall commence, in any Court,
 “ any Action whatsoever, in which the
 “ Plaintiff or Demandant might have
 “ Costs, in case Judgment should be
 “ given for him, and the Plaintiff or
 “ Demandant shall be nonsuited after
 “ the Appearance of the Defendant, or
 “ a Verdict shall pass against him, that
 “ then the Defendant, in every such
 “ Action, shall have Judgment to recover his Costs, to be assessed and
 “ levied, as Costs are in certain Cases to
 “ be assessed and levied, by the Law of
 “ the Twenty-third Year of the Reign
 “ of King *Henry* the Eighth.”

Cro. Eliz.
 465. *Alfop v*
Cleydon.

A special Verdict having been found, upon which there was afterwards Judgment for the Defendant, a Question arose, whether the Defendant ought to have Costs ? It was holden that he ought ; and by the Court : A special Verdict,

Verdict, when Judgment is thereupon given, becomes as much a general Verdict, as if a general Verdict had been at first found.

It has been shewn ; that if a common Informer bring an Action, for the Whole or Part of a Penalty, given by a Statute to any Person who shall sue for the same, he cannot recover Costs, unless Costs are given by the Statute inflicting the Penalty. Ante, p. 112

The Consequence of this would be, that a Defendant in such Action could not recover Costs, either under the 23 *H. 8. c. 15.* or the 4 *Jas. 1. c. 3.* unless Costs are given to the Plaintiff, in Case he obtain a Verdict, by the Statute inflicting the Penalty ; because neither of these Statutes does give Costs to a Defendant in any Action, except such wherein the Plaintiff might have recovered Costs.

To remedy this Inconvenience, it is by the 18 *Eliz. c. 5.* enacted : “ That
“ if any common Informer shall will-
“ ingly

“ ingly delay his Suit, or shall discon-
 “ tinue or be nonsuit, or shall have the
 “ Matter pass against him therein by
 “ Verdict or Judgment in Law, the
 “ said Informer shall pay to the Defen-
 “ dant his Costs, Charges and Damages,
 “ to be assigned by the Court in which
 “ the Suit shall be attempted.”

But it is provided by *Par. 7.* of that Statute : “ That it shall not extend to
 “ any Officer, who, in respect of his
 “ Office, has heretofore lawfully used to
 “ sue upon penal Laws, nor to any Of-
 “ ficer suing for Matters only concern-
 “ ing his Office.”

Hutt. 35, 36.
 2 Keb. 106.
 581.

It has been holden ; that the 18 *Eliz.*
c. 5. extends to an Action brought up-
 on a repealed Statute ; for that the Vex-
 ation is the greater, to sue upon a Sta-
 tute not in Force ; and that it extends
 likewise, to an Action brought in a Court
 not having Jurisdiction.

1 Will. 177.
 Law qui tam
 v. Worrall,

The Defendant, in an Information
 upon the 8 G. 1. for killing Game, had
 Judgment for Want of a Replication,
 and

and had obtained a Side-Bar Rule for Costs. Upon a Motion to set aside this Rule, it was said; that no Costs are given by the 8 G. 1.; and that the 18 *Eliz. c. 5.* does not extend to subsequent Statutes. No Rule was made; and by the Court: The Words of the 18 *Eliz. c. 5.* which are very general, extend to an Information upon any penal Statute.

Upon a Rule to shew Cause, why the Master should not review his Taxation of Costs, it appeared; that in an Action for the Penalty, given by the 21 *H. 8. c. 13.* against a spiritual Person who should take Land to Farm, a Moiety of which is given to the King, there was a Verdict for the Defendant; and that the Master had taxed Costs for him. The Rule was discharged; and by Lord *Mansfield* Ch. J. as this Action is brought by a common Informer, the 18 *Eliz. c. 5.* is decisive in the Point. It has been said; that as the King, who is to have a Moiety of the Penalty, pays no Costs, the Defendant ought not to receive any: But this is not to be considered

MS. Rep.
Wilkinson
qui tam v.
Abbot, Micha
16 G. 3. in
K. B.

dered as a Suit prosecuted by the King, although he is to have a Moiety of the Penalty.

Str. 1103.
Garland qui
tam v. Bur-
ton.

In an Information upon the 21 *H. 8. c. 13.* for Non-residence, there was Judgment upon a Demurrer for the Defendant. It was holden; that the Defendant, although the Judgment was not upon the Merits, was entitled to Costs under the 18 *Eliz. c. 5.*

1 And. 116.
2 Leon. 116.
4 Leon 55.

It has been holden; that the Defendant, in an Action upon a penal Statute brought by the Party injured, cannot recover Costs under the 18 *Eliz. c. 5.* In as much as that Statute does only extend to an Action brought by a common Informer.

But the Defendant, in an Action upon a penal Statute brought by the Party injured, may recover Costs under the 4 *Ja. 1. c. 3.* in case the Plaintiff could have recovered Costs therein; Costs being by that Statute given to the Defendant, in every Action wherein the Plaintiff might have recovered Costs.

And

And it has been already shewn, that Ante, p. 7, 2.
the Party injured may in some Cases recover Costs, in an Action upon a penal Statute, although Costs are not mentioned in the Statute.

It has been holden in one Case; that Cro. Ja. 158.
if the Plaintiff do not alledge in his Declaration a good Cause of Action, the Blyth v. Topham.
Defendant is not entitled to Costs, notwithstanding there be a Verdict for him; Pasch. 5 Ja. 1.
and by the Court: Judgment ought in such Case to be given upon the Insufficiency of the Declaration, and not upon the Verdict.

But the contrary is laid down in three Cases; two of which are subsequent to the Case of *Blyth v. Topham*.

In one of these, which was an Action Moor 625.
of Debt upon a Bond for the Performance Ladd v.
of an Award, the Non-performance Wright, Hil,
of a Thing was alledged, which 43 Eliz.
was not within the Submission. The Defendant pleaded Performance of that Thing; and Issue was joined upon the Plea. A Verdict being found for the Defen-

Defendant, it was insisted; that he was not entitled to Costs: Because Judgment ought to be given upon the Insufficiency of the Declaration, and not upon the Verdict. It was holden; that the Defendant ought to have Costs, these being given for the Vexation.

Hob. 219.
Drury v.
Firch, Hil.
15 Ja. 1.

In another of them, wherein the Plaintiff was nonsuited, in an Action upon the Case for Words which were not actionable, it was insisted; that, as Judgment ought to be given upon the Insufficiency of the Declaration, and not Judgment of Nonsuit, the Defendant was not entitled to Costs. It was holden; that he ought to have Costs: The Words of the Statute being; that the Defendant shall have Costs, in Case the Plaintiff be nonsuited after Appearance of the Defendant. And the Vexation is certainly more gross, where a Plaintiff has no Cause of Action.

Cro. Car. 175.
Heyler's Case,
Mich. 5 Car. 1.

In the other, a Man and his Wife had joined in an Action, wherein they ought not to have joined, and there was
a Verdict

a Verdict for the Defendant. It was holden ; that the Defendant ought to have Costs ; and by the Court : The Statutes give Costs to the Defendant upon Account of the Vexation ; and the Plaintiff shall never avail himself of the Insufficiency of his Declaration, or Writ, to deliver himself therefrom.

It is said ; that the Defendant ought not to have Costs, in Case the Plaintiff have entered a *Nolle prosequi* ; for that this being a Release of the Right of Action, the Defendant cannot be vexed with another Action, as he may after a Nonsuit. It is added ; that there is no Instance of Costs having been allowed to a Defendant after a *Nolle prosequi* : But the Reporter concludes with saying, that what was done in the Case does not appear.

Hard. 153.
Turner v.
Gallilee.

CH A P. IX.

Of the Right of a Defendant to
Costs, in Case the Plaintiff do
not declare in proper Time, or
discontinue his Suit.

BY the 18 *Eliz. c. 2.* after reciting,
“ That divers Persons, without
“ just Cause, do procure others to be
“ troubled by Attachments and Arrests
“ of their Bodies, as well by Process
“ of *Latitat, Alias* and *Pluries Capias*,
“ sued out of the Court of King’s Bench,
“ as well as by Plaint, Bill or Suit in
“ the Marshalsea Court, and within the
“ City of *London*, and other Cities,
“ Towns corporate, and Places where
“ Privilege is to hold Pleas of Debt,
“ Trespafs, and other personal Actions
“ and Suits; and many Times there is
“ no Declaration or Matter laid against
“ the Parties so arrested or attached :”
It is enacted : “ That when any Person
“ shall sue forth any one of the Writs
“ or

“ or Process before mentioned, upon
 “ which any Person shall happen to be
 “ arrested, or shall appear upon the Re-
 “ turn thereof, and put in Bail to an-
 “ swer such Suit as shall be objected
 “ against him ; that in every such Case,
 “ if the Party, at whose Suit the Writ or
 “ Process was sued forth, do not, within
 “ three Days after such Bail taken, put
 “ into Court his Declaration ; or if, af-
 “ ter Declaration put into Court, the
 “ Plaintiff shall not prosecute the same
 “ with Effect, but shall willingly suffer
 “ his Suit to be delayed, or shall suffer
 “ the same Suit to be discontinued, or
 “ shall be nonsuited in the same, the
 “ Judges of the said Court shall by their
 “ Discretions award to every Person, so
 “ arrested, vexed, molested or troubled
 “ by such Suit, his Costs, Damages and
 “ Charges, sustained by Occasion of any
 “ such Writ, Process, Arrest or Suit.”

Four Persons having been arrested by
 Virtue of a *Latitat*, three of them ap-
 peared and put in Bail, and, for Want of
 a Declaration in Time, each of them
 signed Judgment of Nonprofs. Upon

Vin. Tit.
 Costs, 341.
 pl. 14.

G

a Mo-

a Motion to set aside these Judgments for Irregularity, the Court had at first some Doubt, whether they ought not all to have joined in signing one Judgment? But the Judgments were afterwards holden to be regular; because the 8 *Eliz. c. 2.* gives Costs to every Person who has been so unjustly vexed.

By the 13 *Car. 2. St. 2. c. 2.* it is enacted: “ That unless the Plaintiff, who
 “ has sued a Writ, Bill or Process, out
 “ of the Court of King’s Bench or
 “ Common Pleas, shall put into the
 “ Court, from whence such Writ, Bill
 “ or Process did issue, his Bill or Declaration against the Person thereupon
 “ arrested, in any personal Action, or
 “ in *Ejectione firmæ* of Lands or Tenements, before the End of the Term
 “ next after Appearance entered, that a
 “ Nonsuit may be entered, and the Defendant shall have Judgment to recover his Costs against such Plaintiff,
 “ to be sued and levied, as is provided
 “ by the Statute made in the Twenty-third Year of King *Henry* the Eighth.”

The

The Provision, made by the 8 *Eliz.* c. 2. for the Costs of the Defendant, in Case the Plaintiff suffer his Suit, commenced by a Writ out of the Court of King's Bench, to be discontinued after Declaration, is not extended by the 13 *Car. 2. St. 2. c. 2.* to the Case of a Plaintiff, who suffers his Suit, commenced by a Writ out of the Court of Common Pleas, to be discontinued after Declaration.

The Reason of this seems to be ; that, in the intermediate Time between the making of the two Statutes, it had been holden by the Court of Common Pleas ; that a Plaintiff cannot discontinue his Suit without Leave of the Court, because the Entry in such Case is *recordatur per curiam* ; and that if he do discontinue without Leave, the Defendant may enter a Continuance.

1 Leon. 105.
Beare v. Underwood,
Mich. 30 Eliz.

This being so, it was not necessary for the 13 *Car. 2. St. 2. c. 2.* to provide for the Case of discontinuing a Suit ; it being always in the Power of the Court, to annex the Condition of paying Costs, when it gives Leave to discontinue a Suit.

Comb. 399.
Poole v.
Purdy.

It is moreover laid down in one Case; that the Court will never give a Plaintiff Leave to discontinue his Suit, without Payment of Costs.

C H A P. X.

Of the Right of a Defendant to
Costs, in Case there be Judgment
for him upon a Demurrer.

BY the 8 & 9 *W. 3. c. 11. par. 2.*
after reciting, “ That, for Want of
“ a sufficient Provision for the Payment
“ of Costs of Suit, divers evil-disposed
“ Persons are encouraged to bring fri-
“ volous and vexatious Suits ;” it is en-
acted : “ That if upon any Demurrer,
“ either by a Plaintiff or Demandant,
“ in any Action in any Court of Record,
“ Judgment shall be given against the
“ Plaintiff or Demandant, the Defen-
“ dant or Tenant shall have Judgment
“ to recover his Costs against such
“ Plaintiff or Demandant, and have
“ Execution to recover the same by *Ca-*
“ *pias ad Satisfaciendum, fieri facias* or
“ *elegit.*”

G 3

Upon

1 Salk. 194.
Thomas v.
Lloyd.
Ld. Raym.
337. S. C.

Upon a Demurrer to a Plea of Privilege there was Judgment, *quod billa cassetur*; a Question arising, whether the Defendant ought to have Costs under the 8 & 9 W. 3. c. 11. ? It was holden that he ought not; and by the Court: That Statute does not extend to a Demurrer to a Plea in Abatement; because the Intention thereof, as appears from the Preamble, is to prevent frivolous and vexatious Actions, and it never can appear, upon such Plea, that the Action is frivolous or vexatious. It would likewise be very hard, that the Defendant should in such Case have Costs; whereas the Plaintiff would not have had Costs, there had been Judgment against the Defendant *quod respondeat ouster*.

Ld. Raym.
992. Gar-
land v. Exton.

If Judgment be given for the Defendant, upon a Demurrer to a Plea in Abatement, he is not entitled to Costs under the 8 & 9 W. 3. c. 11. the Intention of that Statute being only to give Costs, where the Merits of the Cause are determined upon the Demurrer: Whereas the Judgment in such Case

Case is no more than *quod quærens nil capiat per Billam.*

But if Issue be joined upon a Plea of Abatement, and the Plaintiff at the Trial thereof be nonsuited, the Defendant is entitled to Costs : Because the Plaintiff, if there had been a Verdict for him, would have had Costs ; a Verdict being in such Case peremptory.

Ca. Pr. in
C. B. 35.
Aplin v.
Constable.

It has been holden ; that if Judgment be given for the Defendant upon a Demurrer in an Action of *Quare impedit*, he is entitled to Costs under the 8 & 9 W. 3. c. 11.

Ca. Pr. in
C. B. 4 Anon.
Trin. 11 Ann.

In a subsequent Case, wherein Judgment was given for the Tenant, upon a Demurrer in an Action of *Formedon*, the Question was ; whether he ought to have Costs under the 8 & 9 W. 3. c. 11. ? It was insisted for the Demandant ; that, notwithstanding the Words of that Statute are general, namely, “ That, if “ upon any Demurrer, either by a Plaintiff or Demandant, Judgment shall “ be given against the Plaintiff or De-

Ca. Pr. in C.
B. 25.
Miller v.
Seagrave,
Hil. 10 G. 1

“mandant, the Defendant or Tenant
 “shall never recover his Cost,” it has
 been holden ; that a Defendant, for
 whom there is a Judgment upon a De-
 murrer to a Plea in Abatement, ought
 not to have Costs ; it not being the In-
 tention of that Statute, to give a De-
 fendant or Tenant Costs in the Case of
 a Demurrer, unless he would have been
 entitled thereto in the Case of a Non-
 suit or Verdict ; and that the Tenant
 ought not to have Costs in an Action
 of *Formedon*, either in the Case of a
 Nonsuit or Verdict ; because the De-
 mandant cannot recover Costs in such
 Action. *King Ch. J. Dormer J. and*
Denton J. were of Opinion, that the
 Tenant ought not to have Costs : But
Tracy J. being of a different Opinion,
 it was argued again. After a second
 Argument, and taking Time to consider,
 it was holden ; that the Tenant ought
 not to be allowed Costs.

As the Reason for not allowing the
 Tenant Costs in this Case, namely, that
 the Demandant cannot recover Costs in
 an Action of *Formedon*, holds equally
 for

for a Defendant's not having Costs upon a Demurrer in an Action of *Quare impedit*, it is probable; that the preceding Case, which does not appear to have undergone much Consideration, is not Law.

C H A P. XI.

Of Costs, where a Plaintiff sues in
Forma Pauperis.

BY the 23 H. 8. c. 15. par. 2. it is enacted : “ That every poor Person, being Plaintiff in any of the Actions mentioned in this Statute, which at the Commencement of his Action is admitted, by the Discretion of the Judge or Judges where such Action shall be pursued, to have his Process and Counsel of Charity, without paying Money or Fee for the same, shall not be compelled to pay any Costs : But shall suffer other Punishment, as by the Discretion of the Justices or Judge, afore whom such Suit shall depend, shall be thought reasonable.”

MS. Rep.
Oats v. Holiday, Trin.
22 G. 2. in
K. B.

Upon an Application of the Plaintiff to be admitted to sue in *Forma Pauperis*, the Court at first doubted ; whether this could be done after the Commencement
of

of the Suit? But it was afterwards holden; that a Plaintiff may be admitted to sue in *Forma Pauperis* at any Time pending the Suit. It was likewise holden; that if a Plaintiff be admitted, at any Time pending the Suit, to sue in *Forma Pauperis*, he shall pay no Costs from the Beginning of the Suit.

It is laid down in one Case; that if a Plaintiff, suing in *Forma Pauperis*, do not proceed to Trial pursuant to Notice, or be guilty of any other Default, the Defendant is entitled to Costs.

Ca. Pr. in
C. B. 47.
Walker v.
Packer.
Trin. 2 G. 2.

In another Case it is laid down; that if a Plaintiff, who sues in *Forma Pauperis*, do not proceed to Trial pursuant to Notice, the Court, in order to prevent his being vexatious, will not suffer him to try the Cause, until he has paid Costs for not having proceeded to Trial.

Str. 420.
Nokes v.
Wats, East.
7 G. 1.

But it is said in a subsequent Case; that it is absurd to oblige a Plaintiff to pay Costs, so long as his Admission to sue in *Forma Pauperis* continues; and in this Case a Rule was made to shew Cause,

Str. 983.
Taylor v.
Lowe, Trin.
7 G. 2.

Cause, why the Plaintiff, who had more than once neglected to go to Trial, pursuant to Notice, should not be dispanhered? Which Rule was afterwards made absolute.

Str. 878.
Winter v.
Slow.

Upon a Rule to shew Cause, why the Proceedings in the Action should not be stayed, until the Costs of a Nonsuit in a former Action should be paid, it appeared; that the Plaintiff had in both Actions sued in *Forma Pauperis*, and that the Nonsuit in the former Action was not upon the Merits; but, owing to a Mistake made by his Attorney. The Rule was discharged; the Court being of Opinion, that the Plaintiff had not been vexatious.

Sid 261.
Munford v.
Patt.

It is in one Case said; that if a Plaintiff, who sues in *Forma Pauperis*, be nonsuited, he shall pay Costs, or undergo the Punishment of being whipped.

Salk. 506.

But upon a Motion, that a Pauper, who after a nonsuit had refused to pay Costs, might be whipped; no Rule was made: And *Holt Ch. J.* said, he had never known this done; and that he had no Officer for the Purpose.

C H A P.

C H A P. XII.

Of Costs, where a Plaintiff sues by Guardian, or *Prochein Amy*.

AN Infant having been nonsuited, in an Action of Trespass *vi et armis*, brought in the Name of his Guardian, the Question was; whether the Defendant was entitled to Costs? It was holden, that he was not.

Cro. Eliz. 33.
Grave v.
Grave.

An Infant Plaintiff, who sues by *Prochein Amy*, is not liable to Costs; because he cannot while under Age disavow the Suit: But if a *Feme Covert* sue by *Prochein Amy*, she is liable to Costs; because she is capable of disavowing the Suit whenever she pleases.

Str. 708.
Turner v.
Turner.
2 Will. 279.

The *Prochein Amy* of an Infant Plaintiff is liable to Costs; and if it appear to the Court, that the *Prochein Amy*, already named, is not of sufficient Ability to pay such Costs as he may be liable to, the Court will order a *Prochein Amy* of sufficient Ability to be named.

1 Barn. 105.
Slaughter v.
Talbot.

C H A P. XIII.

Of Costs, where a Plaintiff sues
as Executor, or Administrator.

Cro Eliz. 69.
503. Cro. Ja.
229, 361.

NEITHER the 23 H. 8. c. 15.
nor the 4 Ja. 1. c. 3. by which
Statutes Costs are given to Defendants,
does except the Case, where an Execu-
tor or Administrator is Plaintiff: But
the Construction of both Statutes has
been, that such Plaintiff is not liable
to Costs; because, as he cannot be per-
fectly conversant of the Affairs of his Tes-
tator or Intestate, and does moreover sue
in auter droit, it is not to be presumed,
that he brought the Action merely to
vex the Defendant.

Ca. Pr. in
C. B. 14.
Lamley v.
Nichols,
Mich. 4 G 1.

It is in one Case laid down; that, if
Judgment of *Nonpross* be signed against
an Executor, for Want of a Declaration,
or for Want of a Replication, he is in
either Case liable to Costs; because he
has been guilty of a Default.

In

In another Case, it is laid down generally ; that an Executor shall pay Costs upon a Judgment of *Nonpross.*

3 Burr. 1585.
Henes v.
Saunders,
Mich. 5 G. 3.

As the Law does not seem to be settled ; whether the Court will give an Executor or an Administrator Leave to discontinue his Suit ? without annexing the Condition of paying Costs, it will be proper to mention the principal Cases upon the Point.

In one Case, Leave was given to an Administrator to discontinue his Suit, without paying Costs.

Str. 871:
Baynham v.
Matthews,
Trin. 4 G. 2.

In another Case, in which Leave was given to an Executor to discontinue, after a Demurrer to his Bill against a Member of Parliament, it was holden ; that the Executor ought to pay Costs ; the Discontinuance being rendered necessary by his Default.

Ca. Pr. in
C. B. 79.
Haydon v.
Norton,
Mich. 6 G. 2.

In another Case, it was holden ; that the giving of Leave to discontinue a Suit is discretionary ; and that the Court ought not to give an Executor Leave to discontinue his Suit, in any Case where
he

3 Burr 1451.
Harris v.
Jones, Hil.
4 G. 3.

he has knowingly brought a wrong Action, unless he consent to pay Costs.

MS. Rep.
Danet v.
Coker, Mich.
7 G. 3. in
K. B.

In another Case, it appeared ; that a Rule for Judgment, as in the Case of a Nonsuit, had been discharged, upon an Undertaking to try the Cause at the next Assize; that the Plaintiff, who was an Executor, entered the Cause at the next Assize; and that he afterwards withdrew the Record Leave was given to discontinue the Suit, without paying Costs.

2 Barn. 107.
Ogle v. Mosfat, Mich.
17 G. 2.

Upon a Rule to shew Cause, why the Plaintiff should not pay Costs, for not proceeding to Trial pursuant to Notice, it appeared ; that one material Witness, who had been served with a Subpœna, could not attend ; and that another material Witness was disabled by a Fall from his Horse from attending. The Rule was discharged ; and by the Court : The Plaintiff has not made any wilful Default ; if he had, he must have paid Costs, although he sue as Executor.

3 Burr. 1585.
Hawes v.
Saunders,
Mich. 5 G. 3.

The Doctrine of the Case of *Ogle v. Mosfat* is adhered to in a subsequent Case;

Cafe; it being in the latter Cafe said; that an Executor shall pay Costs, if he do not proceed to Trial pursuant to Notice.

A Rule for Judgment as in the Cafe of a Nonsuit having been discharged, upon an Undertaking to try the Cause at the next Assize; the Plaintiff, who was an Executor, entered the Cause at the next Assize: But he afterwards withdrew the Record. A Question arising, whether the Plaintiff ought to pay any Costs? It was holden that he ought not; and by Lord *Mansfield* Ch. J. if the Cause had been called on, and there had been a Nonsuit, the Plaintiff would not have been liable to any Costs; and, as the withdrawing of the Record was beneficial to the Defendant, who thereby saved the Court Fees, there is no Reason that the Plaintiff should pay any Costs.

MS. Rep.
Danet v
Coker, Mich.
7 G. 3. in
K. B.

An Administrator, who was sued in an Ecclesiastical Court for Tithes due from his Intestate, obtained a Rule for a Prohibition. Being afterwards non-

Ca. Pr. in
C. B. 157.
Creak v. Fit-
carne.

H. futed

sued in a Suit upon the Writ of Prohibition, the Question was, whether he was liable to Costs? It was holden, that he was not; and by the Court: The Administrator being sued in the Ecclesiastical Court as Administrator, he could not declare in the Suit upon the Writ of Prohibition in his own Right.

Ld Raym.
1414
Portman v.
Cane.

In an Action of Debt, brought by an Executor, upon a Bond for Performance of Covenants entered into by his Testator, the Breach of Covenant assigned was alledged to have been committed after the Death of the Testator. The Plaintiff being nonsued; a Question arose, whether he was liable to Costs? It was holden that he was not; and by the Court: As the Bond was the Cause of Action, the Plaintiff could not sue otherwise than as Executor.

Sir Th. Jon.
47. Bull. v.
Palmer.

If an Executor declare upon an *In-
simul Computasset* with himself, for a Debt due to his Testator, he is not liable to Costs: Because the Action is not founded upon a new Right acquired by the
Executor,

Executor, but upon the Ascertainment of a Debt due to his Testator.

If an Executor bring an Action, for the Conversion of his Testator's Goods during the Life of the Testator, he is not liable to Costs ; because the Action is brought in the Right of his Testator.

2 Barn. 99.
Downs v.
Shaft.

It was heretofore holden ; that if an Executor bring an Action, for the Conversion of the Goods of the Testator after the Death of the Testator, he is not liable to Costs ; because, such Goods being Assets, for which he is answerable, the Action is brought in the Right of his Testator : But the contrary has been since holden in divers Cases.

3 Lev. 60.
Mason v.
Jackson. Trin.
34 Car. 2.

It was in one Case holden ; that an Executor, who brings an Action for the Conversion of the Goods of his Testator after the Death of the Testator, is liable to Costs ; because he might have brought the Action in his own Right.

Ca Pr. in
C. B. 61.
Atkins v.
Spence.

In another Case it appeared ; that the Plaintiff and his Wife, who was Exe-
H 2 cutrix

Harris and
Wife v. Han-
na, Rep
Time of
Hardw. 205.

cutrix to *Lucas*, had declared in an Action of *Trover* for Goods which were in the Hands of the Wife's Testator in his Life-time; that the Goods, after the Testator's Death, were converted by the Defendant; and that at the Trial of the Cause the Plaintiffs were nonsuited. A Question arising, whether Plaintiffs ought to pay Costs? It was holden that they ought; and by Lord *Hardwicke* Ch. J. in a late Case, the Distinction taken in many Cases was recognized; namely, that where it is necessary for a Plaintiff, who is an Executor, to name himself Executor, and bring the Action in the Right of his Testator, he is not liable to Costs: But that, where the Cause of Action arises in the Time of the Executor, he is liable to Costs, although he name himself Executor; because he might have brought the Action in his own Right. And by *Lee* J. the Cause of Action, which, in the present Case, is the Conversion, arose in the Time of the Executor; in which Case an Executor is liable to Costs; because he is supposed to be

be capable of judging, whether there is a sufficient Cause of Action.

And the Doctrine of the two last Cases corresponds with what is laid down in divers other Cases; namely, that a Plaintiff shall not be excused from paying Costs, on Account of his having brought the Action as Executor, unless the Case were so circumstanced, that he could not have brought it in his own Right.

6 Mod. 181.
Str. 682.
Lord Raym.
436.
1 Barn. 90.

In an Action by an Executor, for a Debt due to his Testator, the Defendant pleaded his Discharge as a Fugitive under the 16 G. 2 c. 17. The Plaintiff replied; that the Defendant was not a Fugitive within the Meaning of that Statute, and Issue was joined upon the Plea. The Issue being found for the Defendant, a Question arose, whether he was entitled to the treble Costs given by that Statute? For the Defendant it was insisted; that as his Discharge was subsequent to the Death of the Plaintiff's Testator, the Plaintiff, who was summoned, had an Opportunity, at the

2 Barn. 123.
Bligh v.
Cope

Sessions, of controverting the Truth of the Defendant's being a Fugitive ; and that, as the Plaintiff, after having neglected to do this, has in the present Action put that Fact in Issue, he ought, since the Issue is found against him, to pay treble Costs. It was holden, that he ought to pay no Costs ; and by the Court : If the Plaintiff were liable to any Costs, he would certainly be liable to treble : But he is not liable to any ; for it is admitted, that the Plaintiff, who is an Executor, could not have brought the Action in his own Right ; and it has been frequently holden ; that an Executor is not, in such Case, liable to Costs.

C H A P. XIV.

Of Costs in an Action of Replevin, or in an Action of second Deliverance.

DA M A G E S being recoverable at the Common Law, in an Action of Replevin, or in an Action of second Deliverance, a Plaintiff in either of these Actions may recover Costs under the Statute of *Gloucester*, c. 1.

By the 7 *H. 8. c. 4.* it is enacted :
“ That every Avowant, and every other
“ Person, that makes Avowry or Cogni-
“ fance ; or justifies, as Bailiff to any
“ Person, in a *Replegiare* or second De-
“ liverance, for any Rent, Custom or
“ Service, if his Avowry, Cognifance or
“ Justification be found for him, or the
“ Plaintiff be otherwise barred, shall
“ recover his Damages and Costs that
“ he has sustained, as the Plaintiff should
“ have done if he had recovered.”

H 4

And

And by the 21 *H. 8. c. 19.* it is enacted : “ That every Avowant, and
 “ every other Person, that makes any
 “ Avowry, Justification or Cognisance,
 “ as Bailiff or Servant to any Person, in
 “ any *Replegiare* or second Deliverance,
 “ for Rents, Customs, Services, or for
 “ Damage feasant or other Rent, upon
 “ any Distress taken in any Lands or
 “ Tenements, if the Avowry, Justifica-
 “ tion or Cognisance be found for him,
 “ or the Plaintiff be nonsuit, or other-
 “ wise barred, that then he shall recover
 “ his Damages and Costs against the
 “ Plaintiff, as the Plaintiff should have
 “ done if he had recovered.”

2 Roll. Rep.
 437. Farnell
 v. Keightley.

It has been holden; that, although the Power of making an Avowry be given to an Executor by the 32 *H. 8. c. 37.* which is subsequent to both the Statutes giving Costs to an Avowant, he is entitled to Costs; although Costs are not mentioned in the 32 *H. 8. c. 37.*

Com. 122.
 Smith v. Wal-
 grave.

In an Action of *Replevin*, for taking Cattle in a Place called *A.* the Defendant

dant pleaded in Abatement ; that he took them in a Place called *B.* and after traversing the taking of the Cattle in the Place called *A.* he, in order to have return of the Cattle, avowed the taking of them in the Place called *B.* The Plaintiff confessed the taking to have been in the Place called *B.* and thereupon the Avowant had Judgment for the Abatement of the Writ, and for the Return of the Cattle. A Question arising, whether the Avowant ought to have Costs ? It was holden that he ought not ; and by the Court : Neither the 7 *H. 8. c. 4.* nor the 21 *H. 8. c. 19.* by which Costs are given to an Avowant, where the Plaintiff is barred or nonsuited, does extend to this Case ; in which, as the Writ is only abated, the Plaintiff may have a new Writ.

It is laid down in one Case ; that the Defendant in an Action of Replevin, who has avowed the taking for an Amercement by a Court Leet, is not entitled to Costs ; in as much as this is not one of the Cases, wherein Costs are given

Cro. Eliz.
300. *Porter v.*
Gray, Trin.
34 *Eliz.*

given by the 7 *H. 8. c. 4.* or the 21 *H. 8. c. 19.*

Cro. Ja. 520.
Samuel v.
Hodder, Hil.
16 Ja. 1.

But in a subsequent Case it was holden ; that a Defendant in an Action of Replevin, who has avowed the taking for an Amercement by a Court Leet, may recover Costs.

Cro. Eliz.
330. Haslop
v. Chaplin,
Trin. 36 Eliz.

And in another Case, subsequent to the Case of *Porter v. Grey*, in which the Defendant in an Action of Replevin, had avowed the taking as in Estray, it was holden ; that the Defendant is in such Case entitled to Costs ; although it be not one of the Cases mentioned in the 7 *H. 8. c. 4.* or the 21 *H. 8. c. 19.*

Hard. 153.

If an Avowant in an Action of Replevin have pleaded Property in the Thing distrained, he cannot recover Costs ; because Costs are not given in such Case by the 7 *H. 8. c. 4.* or the 21 *H. 8. c. 9.*

By the 11 *G. 2. c. 19. par. 22.* it is enacted : “ That it shall be lawful, for
“ the Defendant in an Action of Re-
“ plevin

“plevin to avow or make Conuzance
 “generally ; that the Plaintiff, or other
 “Tenant of the Land, whereon the
 “Distress was made, enjoyed the same
 “under a Grant or Demise, at a cer-
 “tain Rent, during the Time wherein
 “the Rent distrained for incurred,
 “which Rent was then and still re-
 “mains due ; or that the Place, where
 “the Distress was taken, was Parcel of
 “a Tenement, holden of a certain Ho-
 “nour, Lordship or Manor, for which
 “Tenement the Rent, Relief, Heriot
 “or other Service distrained for, was at
 “the Time of the Distress, and still re-
 “mains due ; without setting forth the
 “Grant, Tenure, Demise, or Title of
 “the Landlord, Lessor or Owner of the
 “Manor ; and if the Plaintiff in such
 “Action shall become nonsuit, discon-
 “tinue his Action, or have Judgment
 “given against him, the Defendant shall
 “recover double Costs of Suit.”

The Defendant, in an Action of Re-
 plevin, having avowed the Taking as a
 Seizure for a Heriot Custom, and the
 Plaintiff being nonsuited ; a Question
 arose,

2 Barn. Sup.
 16. Lloyd v.
 Winton.

arose, whether the Defendant was entitled to double Costs under the 11 G. 2. c. 19. ? It was holden that he was not; and by the Court: A Distress may be made for a Heriot Service; but no Distress can be made for a Heriot Custom. It follows; that, as the Avowry in the present Case is not for a Distress, it is not a Case within the 11 G. 2. c. 19.

By the 17 *Car. 2. c. 7. par. 2.* it is enacted: " That whensoever any Plain-
 " tiff in Replevin shall be nonsuit be-
 " fore Issue joined, in any Suit of Re-
 " plevin, depending in any of the King's
 " Courts at *Westminster*, the Defendant,
 " making a Suggestion, in Nature of an
 " Avowry or Cognizance, for Arrearages
 " of Rent, to ascertain the Cause of the
 " Distress; the Court, upon his Prayer,
 " shall award a Writ to the Sheriff of
 " the County where the Distress was
 " taken, to enquire, by the Oath of
 " twelve good and lawful Men of his
 " Bailiwick, touching the Sum of the
 " Arrearages of Rent at the Time of
 " the Distress, and the Value of the
 " Goods or Cattle distrained; and there-
 " upon

“ upon Notice of fifteen Days shall be
 “ given to the Plaintiff, or his Attor-
 “ ney, of the Sitting of such Inquiry ;
 “ and upon the Return of an Inquifi-
 “ tion, the Defendant shall have Judg-
 “ ment, to recover against the Plaintiff
 “ the Arrearages of Rent, in Case the
 “ Goods or Cattle distrained shall
 “ amount unto that Value ; and in Case
 “ they shall not amount to that Value,
 “ then so much as the Value of the
 “ Goods or Cattle distrained shall a-
 “ mount unto, together with his full
 “ Costs of Suit : And in Case such
 “ Plaintiff shall, after Cognizance or
 “ Avowry made, be nonsuit after Issue
 “ joined, or a Verdict shall be given
 “ against such Plaintiff, then the Jurors,
 “ impannelled or returned to enquire
 “ of such Issue, shall, at the Prayer of
 “ the Defendant, inquire concerning the
 “ Sum of the Arrearages, and the Va-
 “ lue of the Goods or Cattle distrained ;
 “ and thereupon the Avowant, or he that
 “ makes Cognizance, shall have Judg-
 “ ment for the Arrearages, or so much
 “ thereof as the Goods or Cattle amount
 “ unto, together with his full Costs of
 “ Suit.”

By

By the same Statute, *par.* 3. it is enacted: “ That if Judgment, in any of
“ the Courts aforesaid, be given upon
“ a Demurrer for the Avowant, or him
“ that maketh Cognizance for any Rent,
“ the Court shall, at the Prayer of the
“ Defendant, award a Writ, to enquire
“ of the Value of such Distress; and,
“ upon the Return thereof, Judgment
“ shall be given for the Avowant, or
“ him that makes Cognizance for the
“ Arrears alledged to be behind in such
“ Avowry or Cognizance, if the Goods
“ or Cattle so distrained shall amount
“ to that Value; and in Case they shall
“ not amount to that Value, then for so
“ much as the said Goods or Cattle
“ shall amount unto, together with his
“ full Costs of Suit.”

C H A P. XV.

Of Costs in an Action of Waste.

AN Action of Waste lies at the Common Law against a Tenant in Dower, or a Guardian ; for, as such Tenants do always come into Possession by Act of Law, it is highly reasonable, that the Law should guard against the Commission of Waste by them.

2 Inst. 299,
300.

And it seems to be the better Opinion ; that an Action of Waste does for the same Reason lie at the Common Law, against a Tenant by the Curtesy.

1 Inst. 53.
2 Inst. 145.
299, 300.

The Consequence is ; that the Plaintiff in an Action of Waste against a Tenant in Dower, a Tenant by the Curtesy, or a Guardian, may recover Costs under the Statute of *Gloucester*, c. 1. and that the Defendant in either of these Actions may recover Costs under the 4 *Ja.* 1. c. 3. Costs being thereby given
to

to a Defendant in every Action, wherein a Plaintiff might have recovered Costs.

1 Inst. 53.
2 Inst. 299.

An Action of Waste does not lie, at the Common Law, against a Tenant for Life, or a Tenant for Years; because, as such Tenants do always come into Possession by Act of the Person in whom the Inheritance is, it is a Folly in such Person, if he do not guard, in the Deed by which an Estate for Life or an Estate for Years is created, against the Commission of Waste by the Tenant.

It follows; that Costs were not recoverable, before the making of the 8 & 9 *W. 3. c. 11.* in an Action of Waste against a Tenant for Life, or a Tenant for Years. The Plaintiff in such Action could not recover Costs; because the Statute of *Gloucester, c. 5.* by which an Action of Waste is given against these Tenants, did not mention Costs. Nor could the Defendant in such Action recover Costs, because the 4 *Ja. 1. c. 3.* did not enable a Defendant to recover Costs in any Action, except such wherein a Plaintiff might have recovered Costs.

By

By the 8 & 9 *W. 3. c. 11.* it is enacted: "That in all Actions of Waste, the Plaintiff obtaining Judgment, or any Award of Execution after Plea pleaded or Demurrer joined therein, shall recover Costs; and if the Plaintiff shall become Nonsuit, or suffer a Discontinuance, or a Verdict shall pass against him, the Defendant shall recover his Costs, and shall have Execution to recover the same by *Capias ad Satisfaciendum, Fieri Facias*, or *Elig.*"

C H A P. XVI.

Of Costs, in an Action of Debt
for not setting forth Tithes.

COSTS were not recoverable, before the making of the 8 & 9 *W. 3. c. 11.* in an Action of Debt for not setting forth Tythes.

Noy 136.
Cox v. Small.

The Plaintiff, in such Action, could not recover Costs; because it did not lie at the Common Law, and the 2 & 3 *E. 6. c. 13.* by which this Action is given, does not mention Costs.

Nor could the Defendant in such Action recover Costs; because the 4 *Ja. 1. c. 3.* did not enable a Defendant to recover Costs in any Action, except such wherein a Plaintiff might have recovered Costs.

By the 8 & 9 *W. 3. c. 11.* it is enacted: That in all Actions for not setting forth

“ ting forth Tithes, wherein the single
“ Value or Damages found by the Jury
“ shall not exceed twenty Nobles, the
“ Plaintiff obtaining Judgment, or any
“ Award of Execution after Plea plead-
“ ed or Demurrer joined therein, shall
“ recover his Costs of Suit ; and if the
“ Plaintiff shall become nonsuit, or suf-
“ fer a Discontinuance, or a Verdict shall
“ pass against him, the Defendant shall
“ recover his Costs, and have Execution
“ to recover the same by *Capias ad Sa-*
“ *tisfaciendum, Fieri Facias, or Elegit.*”

C H A P. XVII.

Of Costs, in an Action against an Officer, on Account of something done by virtue of his Office.

BY the 43 *Eliz. c. 2. par. 19.* it is enacted: "That if any Action
" of Trespafs, or other Suit, shall be
" brought against any Person for doing
" any Thing by the Authority of this
" Act, the Defendant may plead not
" guilty, or make Avowry, Cognizance
" or Justification; and if there shall be
" a Verdict for the Defendant, or a
" Nonsuit of the Plaintiff, after Ap-
" pearance, the Defendant shall recover
" treble Damages, by Reason of his
" wrongful Vexation, with his Costs,
" and that to be assessed by the same
" Jury, or Writ to enquire of the Da-
" mages, as the same shall require."

In

Upon a Rule to shew Cause, why a Writ of Enquiry should not be awarded, for assessing the treble Damages given by the 43 *Eliz. c. 2.* it appeared; that the Action was brought on Account of something done by the Defendant, as Overseer of the Poor, by virtue of his Office; that there was a Verdict for the Defendant; that the Jury had assessed only single Damages; that there was no Suggestion upon the *Postea*; and that the Master had refused to allow more than single Costs. The Rule was made absolute; and by the Court: It has been said; that as single Costs have been taxed, the present Application is too late; But we are of Opinion; that, as the taxing of single Costs was not at the Desire of the Defendant, the Court is not precluded by the Act of the Master, who refused to allow more Costs, from awarding a Writ of Enquiry. As a Ground, however, for awarding a Writ of Enquiry, it is necessary to enter a Suggestion upon the *Postea*; that the Defendant was an Overseer of the Poor; and that the Action was brought against

I 3 him

Sayer 214.
Bennet v.
Hart.

him for something done by virtue of his Office.

By the 7 *Ja.* 1. c. 5. it is enacted :
“ That if any Action upon the Case,
“ Trespass, Battery or false Imprison-
“ ment, shall be brought against any
“ Justice of Peace, Mayor or Bailiff of
“ City or Town corporate, Headbo-
“ rough, Port-Reve, Constable, Tith-
“ ing-Man, Collector of Subsidy or Fif-
“ teens, for or concerning any Matter,
“ Cause or Thing done by virtue of
“ any of their Offices, it shall be law-
“ ful for any such Officer before named,
“ and all others, which in their Aid or
“ Assistance, or by their Commandment,
“ shall do any Thing touching or con-
“ cerning his Office, to plead the ge-
“ neral Issue, that he or they are not
“ guilty, and to give such special Mat-
“ ter in Evidence to the Jury which
“ shall try the same, which special Mat-
“ ter, being pleaded, had been a good
“ and sufficient Matter in Law, to have
“ discharged the said Defendant or De-
“ fendants of the Trespass or other
“ Matter laid to his or their Charge :
“ And

“ And that, if the Verdict shall pass
 “ with the said Defendant or Defend-
 “ ants, or the Plaintiff or Plaintiffs be-
 “ come Nonsuit, or suffer a Disconti-
 “ nuance thereof, the Justices or Jus-
 “ tice, or such other Judge, before
 “ whom the said Matter shall be tried,
 “ shall by virtue of this Act allow to
 “ the Defendant or Defendants his or
 “ their double Costs.”

By the 21 *Ja.* 1. *c.* 12. *par.* 2. the
 7 *Ja.* 1. *c.* 5. is made perpetual, and
 by the latter Statute *par.* 3. it is en-
 acted : “ That all Churchwardens, and
 “ all Persons called Sworn-Men exe-
 “ cuting the Office of Churchwardens,
 “ and all Overseers of the Poor, and
 “ all others, which in their Aid or As-
 “ sistance, or by their Commandment,
 “ shall do any Thing touching or con-
 “ cerning his or their Offices, shall have
 “ such Benefit by Virtue of the said
 “ Act, to all Intents, Constructions and
 “ Purposes, as if they had been specially
 “ named therein.”

Moor 485. It has been holden ; that the 7 *Ja.* 1.
Phelps v. *c.* 5. extends to a deputy Constable.
Winchcombe.

Clayt. 45. And it is in one Case laid down ; that
the 7 *Ja.* 1. *c.* 5. extends to every Per-
son acting under the Warrant of a Jus-
tice of the Peace.

Cro. Car. 175. If an Officer, entitled to the Benefit
Heyler's Case. of the 7 *Ja.* 1. *c.* 5. be sued on Account
of any Thing done by virtue of his Of-
fice, and a Verdict be found for him,
he has a Right to double Costs ; not-
withstanding Judgment be given for
him on Account of the Insufficiency of
the Declaration.

2 Lev. 251. The 7 *Ja.* 1. *c.* 5. does not extend
Herring v. to an Action for a Nonfeasance, as for
Finch. not admitting a Person to vote at an
Election ; that Statute being expressly
confined to Actions on Account of some
Act done.

Cro. Car. An Action upon the Case being
285. Kerche- brought against a Churchwarden, for
vall v. Smith. having falsely presented the Defendant in
an Ecclesiastical Court, and a Verdict
being found for the Defendant, the
Question

Question was, whether he was entitled to double Costs under the 7 *Ja.* 1. c. 5. ? It was holden that he was not ; and by the Court : The Makers of that Statute did only intend to give an Officer Costs, where he is sued on Account of some temporal Matter, and not where he is sued on Account of a Matter merely Ecclesiastical.

It has been holden ; that the 7 *Ja.* 1. c. 5. does not extend to an Action against a Constable, for having falsely presented a Man to be an Occupier of Lands in the Parish of *A.* By Reason of which he was unduly compelled to pay Rates in the Parish of *A.* ; and by the Court : This is not one of the Actions, wherein Liberty is given by that Statute to plead Not guilty, and give the special Matter in Evidence, and consequently, the Defendant is not entitled to double Costs.

Cro. Car. 467.
Stone v.
Lingar. Trin.
12 Car. 1.

In another Case it is laid down ; that the Design of the 7 *Ja.* 1. c. 5. was only to give double Costs in an Action
for

2 Lev. 251.
Herring v.
Finch. Pasch.
31 Car. 2.

for a false Imprisonment, or such other Matter, in which the Defendant is thereby enabled, to give the special Matter in Evidence upon the general Issue.

1 Show. 215.
Willet v.
Tydy. Pasch.
3 W. 3.

And the Doctrine of the two last cited Cases is recognized, in a Case subsequent to both of them.

2 Ventr. 45.
Anon.

In an Action against a Constable, on Account of something done by virtue of his Office, a Verdict was found for him. There not being an Allowance of double Costs upon the *Postea*, a Question arose, whether the Defect of such Allowance could be cured? It was holden that it could not; and by the Court: As the Words of the 7 *Ja.* 1. *c.* 5. are: “ That the Justices or Justice, or such “ other Judge, before whom the Matter “ shall be tried, shall by virtue of this “ Act allow the Defendant his double “ Costs,” and such double Costs are not in the present Case allowed upon the *Postea*, the Court has no Power to allow them.

Carth. 189.
Willet v.
Tydy. 1 Show.
215. S. C.

In an Action of *Assumpsit* against a Collector of a Tax, for Money had and received

received to the Use of the Plaintiff, a Verdict was found for the Defendant, and the Judge, before whom the Cause was tried, certified; that the Action was brought against him, on Account of something done as Collector of a Tax, imposed by a Statute made in the first Year of the Reign of *William and Mary*. It was holden; that the Defendant ought to have the treble Costs given in such Case by that Statute.

C H A P. XVIII.

Of Costs, in a Suit relative to the
Seizure of Goods by an Officer
of the Customs.

BY the 8 *Ann. c. 7.* “ for prevent-
“ ing the great Charges which
“ Officers of the Customs, seizing Goods
“ prohibited and uncustomed, are put to,
“ by groundless and vexatious Claims
“ entered thereto in the Court where
“ such Goods are prosecuted, it is en-
“ acted : That every Person, upon the
“ Entry of any Claim in the Court
“ where such prohibited or uncustomed
“ Goods are prosecuted, shall be oblig-
“ ed to give Security, in the Penalty of
“ Thirty Pounds, to answer and pay
“ the Costs occasioned by such Claim;
“ and in Default of giving such Secu-
“ rity, within the Time limited by the
“ Course of that Court for entering
“ Claims, such Goods shall be reco-
“ vered.”

In an Information by an Officer of the Customs, upon a Seizure of Tobacco Stalks, the Defendant claimed Property; and, after entering into a Recognizance in the Penalty of Thirty Pounds, to pay the Costs occasioned by the Claim, by his Plea denied the supposed Act of Forfeiture. Issue being joined upon the Plea, and a Verdict being found for the King, the Question was, whether the Attorney General was entitled to any Costs? It was said on the Part of the Defendant; that nothing more was intended by the 8 *Ann. c. 7.* than to reimburse the Officer of the Customs, prosecuting an Information upon a Seizure, the Costs he had been put to by a groundless and vexatious Claim: But it was holden by *Parker* Ch. B. and *Clive* B. (the other Barons being absent) that the Attorney-General was entitled to the Costs occasioned by the Claim; and that the Recognizance might be put in Suit against the Defendant's Securities.

Parker 92.
Attorney General v. *Munn*,
Hil. 22 G. 2.

By the 6 G. 1. c. 21. par. 39. Power is given to an Officer of the Customs,
in

in certain Cases therein mentioned, to stop customable or prohibited Goods, and put them into his Majesty's Warehouse, in the Port next where such Stop shall be made, there to remain, until the Claimer thereof shall make Proof, to the Satisfaction of the Commissioners of his Majesty's Customs; that the Duties of the customable Goods have been paid, or secured to be paid; or that the same have been bought in a lawful Way of Trade, and that the Person claiming the Goods does verily believe the Duties thereof to have been paid, or secured to be paid; or that the Goods have been compounded for, or condemned in his Majesty's Court of Exchequer at *Westminster*, or at *Edinburgh*, or have been delivered by Writ of one of those Courts, and that the prohibited Goods have been compounded for, or condemned, or delivered as aforesaid; in which Cases, the Goods shall be delivered to the Claimer without Delay or Charge.

By the same Statute, *par.* 40 it is enacted: " That such Proof be made,
" within ten Days after the Goods have
" been

“ been stopped ; in Failure whereof,
 “ the same may and shall be seized and
 “ prosecuted, in such Manner, as by
 “ the Laws now in Force against the
 “ Importation of prohibited or uncus-
 “ tomed Goods is provided.”

By the same Statute, *par.* 41. it is
 enacted : “ That if, upon such Prose-
 “ cution, a Verdict shall pass for the
 “ Claimer, or the Officer shall become
 “ nonsuit, or forbear Prosecution, or
 “ discontinue the same ; or if upon De-
 “ murrer, or otherwise, Judgment shall
 “ be given against the Officer, the Claim-
 “ er shall, over and above the Recovery
 “ of his Goods, or the Value thereof,
 “ have reasonable Costs of Suit ; which
 “ Costs of Suit shall be reckoned, and
 “ esteemed, a full Satisfaction for the
 “ Claimer’s Damages, occasioned by
 “ the Seizure and Detention of the
 “ Goods.”

By the same Statute, *par.* 43. it is
 enacted : “ That if the said Commis-
 “ sioners of the Customs shall not, upon
 “ such Proof as is before mentioned,
 “ order

“ order the Delivery of the Goods, the
 “ Owner or Claimer of the Goods may
 “ sue for the Recovery thereof, toge-
 “ ther with Costs and Damages, in any
 “ of his Majesty’s Courts of Record at
 “ *Westminster*, or in the Court of Exche-
 “ quer in *Scotland*.”

By the same Statute, *par.* 43. it is enacted : “ That if the Officer who shall
 “ stop Goods, or any other Officer of
 “ the Customs, shall be desirous to seize
 “ and prosecute the Goods, notwith-
 “ standing an Order of the Commission-
 “ ers of the Customs for the Delivery
 “ thereof ; it shall be lawful for such
 “ Officer, to seize and prosecute the
 “ same, in such Manner, as by the Laws
 “ now in Force such Goods may be
 “ seized and prosecuted, in every of
 “ which Cases, the Officer so prosecut-
 “ ing shall be liable to be sued by the
 “ Owner of the Goods, for the Reco-
 “ very of the Goods, or the Value
 “ thereof, with full Costs of Suit.”

Burn. 91.
 Shipton v.
 Newman,
 Mich. 8 G.1.

In an Information by an Officer of the
 Customs, upon a Seizure of Cocoa Nuts,
 there

there was a Verdict for the Defendant. An Action being afterwards brought by the Defendant, in the Court of Common Pleas, for the Cocoa Nuts, and some Bags, which the Officer took to carry away the Cocoa Nuts in. *King Ch. J.* was of Opinion; that Costs as well as Damages were recoverable in the Action only for the Bags; for that, as to the Cocoa Nuts, the proper Remedy was to move the Court of Exchequer upon the 6 G. 1. c. 21. Upon a Motion in the Court of Exchequer, it was said on the Part of the Officer; that it was not the Intention of 6 G. 1. c. 21. to give the Defendant a double Remedy against the Officer; but only to give him an Election, to bring an Action, or to have Costs under that Statute. It was holden; that the Claimer of the Goods was entitled to the Costs of the Information; and by the Court: As he might have brought his Action for the Bags alone, his joining the Cocoa Nuts in the Action shall not preclude him from the Satisfaction he is entitled unto under the 6 G. 1. c. 21. At the End of the Report of this Case, a Query is added by
K the

the Reporter ; and he observes, that *Mountague B.* was absent.

By the 19 G. 2. c. 34. it is enacted :
 “ That in Case any Information shall be
 “ brought to Trial, on account of the
 “ Seizure of any Ship, as forfeited, for
 “ illegally carrying Goods, or of any
 “ Wool, Goods, Wares or Merchan-
 “ di e, as prohibited or uncustomed, or
 “ as illegally carried or exported, or in-
 “ tended or attempted to be exported,
 “ or as illegally re-landed, after having
 “ been shipped or exported upon De-
 “ benture or Certificate, wherein a Ver-
 “ dict shall be found for the Claimer
 “ thereof, and it shall appear to the
 “ Judge or Court, before whom the
 “ same shall be tried, that there was a
 “ probable Cause of Seizure, the Judge
 “ or Court shall certify on the Record ;
 “ that there was a probable Cause, for
 “ the Prosecutor’s seizing the said Ship
 “ or Goods ; and in such Case, the De-
 “ fendant shall not be entitled to any
 “ Costs of Suit : Nor shall the Person,
 “ who seized the said Ship or Goods,
 “ be liable to any Action, Indictment
 or

" or other Suit or Prosecution, on ac-
 " count of such Seizure: And in case
 " any Action, Indictment, or other Suit
 " or Prosecution, shall be brought to
 " Trial against any Person, on account
 " of the Seizure of such Ship, or of any
 " such Wool, Goods, Wares or Mer-
 " chandize, wherein a Verdict shall be
 " given for the Defendant, and the
 " Court, or Judge, before whom such
 " Action shall be tried, shall certify on
 " the Record, that there was a probable
 " Cause for such Seizure; the Plaintiff,
 " besides his Ship or Goods so seized,
 " or the Value thereof, shall not be en-
 " titled to above Two Pence Damages,
 " nor to any Costs of Suit; nor shall the
 " Defendant, in such Prosecution, be
 " fined above One Shilling.

C H A P. XIX.

Of Costs, in a Suit upon a Writ
of Prohibition.

BY 2 & 3 E. 6. c. 13. it is enacted:
“ That if any Party do sue for a
“ Prohibition, to a Suit in any of the
“ King’s Ecclesiastical Courts for Tithes
“ or Offerings, in any of the King’s
“ Courts where Prohibitions have been
“ used to be granted; then in every such
“ Case, the same Party, before any Pro-
“ hibition shall be granted, shall deliver
“ into the Hands of some of the Justices
“ or Judges of the same Court, the very
“ true Copy of the Libel depending in
“ the Ecclesiastical Court, concerning
“ the Matter wherefore the Party de-
“ mandeth the Prohibition, subscribed
“ or marked with the Hand of the same
“ Party; and under the Copy of the
“ Libel shall be written the Suggestion,
“ wherefore the Party demandeth the
“ Prohibition; and in case the Suggest-
“ tion

" tion, by two honest and sufficient
 " Witnesses at the least, be not proved
 " true in the Court where the Prohi-
 " bition shall be granted, within six
 " Months next after the Prohibition
 " shall be granted; that then the Party,
 " that is letted or hindered of his Suit
 " in the Ecclesiastical Court by such
 " Prohibition, shall, upon his Request,
 " without Delay have a Consultation
 " granted in the same Case, in the Court
 " where the Prohibition was granted;
 " and shall recover double Costs and
 " Damages, against the Party who pur-
 " sued the Prohibition; the said Costs
 " and Damages to be assigned or assess-
 " ed, by the Court where the Consulta-
 " tion shall be granted; for which Costs
 " and Damages the Party, to whom
 " they shall be awarded, may have an
 " Action of Debt in any of the King's
 " Courts of Record, wherein the De-
 " fendant shall nor wage his Law, nor
 " have any Eessoign or Protection allow-
 " ed or admitted.

The Suggestion, for obtaining a Pro-
 hibition to a Suit in an Ecclesiastical

Cro Eliz. 7 36.
 Austen v.
 Pigot.

K 3

Court

Court for Tithes, was; that the Proprietor of the Rectory of the Parish of *A.* in which Parish the Lands of which Tithes were demanded lay, and all his Predecessors, have had twenty Acres of Pasture, and twenty Acres of Wood, in Satisfaction of Tithes. The Witnesses, examined to prove the Truth of the Suggestion, proved; that the Proprietor had the twenty Acres of Pasture; but they did not prove, that he had the twenty Acres of Wood. In order to obtain a Consultation, it was insisted; that the Suggestion is insufficient, for want of shewing what Estate the Proprietor had in the Pasture and Wood; and that the Suggestion is not proved as it is alledged. A Consultation was refused; and by the Court: It is sufficient to suggest, that the Proprietor had the Pasture and Wood in Satisfaction of Tithes, and so *Dr. Cotton's Case* was ruled. It is not necessary, that a Suggestion should be proved precisely; for, if it appear from the Proof, that the Ecclesiastical Court ought not to hold Plea of the Matter, that is sufficient. If the Suggestion be, that a Person holds a
hundred

hundred Acres of Land in Satisfaction of Tithes; and the Proof be, that he holdeth only sixty Acres in Satisfaction thereof, it is well enough. In the present Case, the Substance of the Suggestion is proved; namely, that the Proprietor held Lands in Satisfaction of Tithes.

If the Party, who has obtained a Writ of Prohibition, be ordered to declare in Prohibition, he is not obliged to prove the Truth of his Suggestion within six Months, in the Manner directed by the 2 & 3 E. 6. c. 13. the Proof being in such Case to be made at the Trial of the Cause.

Ca. Pr. in
C. B. 158.
Creak v.
Pitcarne.

It has been holden; that the Defendant, in a Suit upon a Writ of Prohibition, is not entitled to double Costs under the 2 & 3 E. 6. c. 13. for Want of the Plaintiff's having proved the Truth of his Suggestion within six Months, unless a Consultation be granted.

Latch. 140.
Watkinson v.
Pacy.

Costs were not recoverable before the making of the 8 & 9 W. 3. c. 11. in a

K 4

Suit

Suit upon a Writ of Prohibition, except for Want of proving the Truth of the Suggestion within six Months.

The Plaintiff, in such Suit, could not recover Costs under the Statute of *Gloucester*, c. 1. because he did not recover any Damages.

Nor could the Defendant, in such Suit, recover Costs : Because the 4 *Ja.* 1. c. 3. did not enable him to recover Costs in any Action, except such wherein the Plaintiff might have recovered Costs.

By the 8 & 9 *W.* 3. c. 11. *par.* 3. it is enacted : “ That in all Suits upon
 “ Prohibitions, the Plaintiff obtaining
 “ Judgment, or any Award of Execu-
 “ tion after Plea pleaded, or Demurrer
 “ joined therein, shall recover his Costs
 “ of Suit ; and if the Plaintiff shall be-
 “ come Nonsuit, or suffer a Disconti-
 “ nuance, or a Verdict shall pass against
 “ him, the Defendant shall recover his
 “ Costs, and have Execution for the
 “ same by *Capias ad Satisfaciendum*, *Fi-*
 “ *eri Facias*, or *Elegit*.”

It

It was in one Case, in the Court of Common Pleas, holden; that the Plaintiff, in a Suit upon a Writ of Prohibition, should have the Costs of the Suggestion, and all Costs incident and subsequent thereto.

Ca. Pr. in
C. B. 11.
Wills v. Turner. Hil.
2 G. 1.

But in a subsequent Case it was holden, and made a standing Rule of the Court of Common Pleas; that the Plaintiff in such Suit shall only have Costs, from the Time of making the Rule for the Writ of Prohibition absolute.

Ca. Pr. in C.
B. 21.
Bettenson v. Henchman.
Mich. 7 G. 1.

Upon a Rule to shew Cause, why the Prothonotary should not review his Taxation of Costs, it appeared; that the Plaintiff, in a Suit upon a Writ of Prohibition, had been nonsuited; and the Question was, whether the Defendant ought to have the Costs, incurred by opposing the Rule to shew Cause why the Writ of Prohibition should not be granted, as well as the Costs of the Nonsuit? It was holden; that he ought to have only the Costs of the Nonsuit; and by the Court: If the Defendant had succeeded in his Opposition, to the Rule

MS. Rep.
Carlisle and another v. Meyrick.
Hil. 17 G. 3.
in C. B.

to shew Cause why a Writ of Prohibition should not be granted; it would even then have been for the Consideration of the Court, whether, upon all the Circumstances of the Case, that Rule should be discharged with Costs: But, as he did not succeed in that Opposition, it must now be intended, that it was groundless; and consequently, there is no Pretence for his being allowed the Costs thereof.

Str. 1063
Middleton v.
Croft.

If Judgment be given for the Plaintiff, in a Suit upon a Writ of Prohibition, as to Part of what is in Issue, he is entitled to Costs, although a Consultation be granted as to the Residue; the Words of the 8 & 9 W. 3. c. 11. being, “ That
“ the Plaintiff obtaining Judgment, af-
“ ter Plea pleaded, or Demurrer joined,
“ shall recover Costs.”

2 Barn. 117.
Malton v.
Ackham.

If a Verdict be found for the Defendant in a Suit upon a Writ of Prohibition, as to Part of what is in Issue, he is entitled to Costs; the Words of the 8 & 9 W. 3. c. 11. being, “ That if a
“ Verdict shall pass against the Plaintiff,
“ the Defendant shall recover Costs.

It

It was, at the Defendant's Instance, made Part of the Rule for a Writ of Prohibition; that the Plaintiff should declare in Prohibition. A Declaration being delivered, the Defendant did not plead to the Merits; but pleaded, that he had not proceeded in the Ecclesiastical Court since the granting of the Writ, and demanded a Replication. A Rule to shew Cause, why the Plaintiff should not be allowed the Costs of the Proceedings upon the Writ of Prohibition, was made absolute; and by the Court: It is necessary for the Plaintiff, in a Suit upon a Writ of Prohibition, to alledge in his Declaration; that the Defendant did proceed in the Ecclesiastical Court after the granting of the Writ: But, it being quite immaterial whether he did or not, this Fact is not traversable; and, consequently, the Plea in the present Case is to be considered as a mere sham Plea.

2 Barn. Sup.
17. Seed v.
Wolfenden.

C H A P. XX.

Of Costs, where a feigned Issue is ordered.

2 Barn. 100.
Palmer v.
Williams.

UPON a Rule to shew Cause, why a Writ of Prohibition should not be granted, to a Suit in an Ecclesiastical Court for subtracting the Tithe of Gooseberries, a feigned Issue was directed; to try, whether the Ground on which the Gooseberry Bushes grew were Parcel of an antient Orchard? The Issue being found for the Party moving for a Writ of Prohibition, the Rule was made absolute; and it was holden; that he should have the Costs of trying the feigned Issue.

Sayer 25.
Hibbert v.
Williams.

Upon a Rule to shew Cause, why an Information for a Misdemeanor should not be filed against the Defendant, a feigned Issue was, by Consent, ordered. The Issue having been found for the Defendant, and the Rule to shew Cause having

having, in Consequence of the Verdict, been discharged, the Question was, whether, as Costs are not mentioned in the Rule ordering the feigned Issue, or in the Rule discharging the Rule to shew Cause, the Defendant ought to have any Costs? It was holden; that he ought to have the Costs of the Issue, but not of the Rule to shew Cause; and by *Wright J.* (*Lee Ch. J.* being absent) it has been said; that although Costs always follow the Verdict, when a feigned Issue is ordered in a Civil Action, none ought to be paid, when a feigned Issue is ordered in a criminal Proceeding; because neither Party is entitled to Costs in such Proceeding: But, in the Case of *Still v. Rogers*, wherein a feigned Issue was ordered in a criminal Proceeding, it was holden; that Costs ought to follow the Verdict. From a Note I have of that Case, it appears; that, although Costs were not mentioned in the Rule ordering the feigned Issue, the Determination of the Court of King's Bench was, that Costs ought to follow the Verdict. It was also said by *Holt Ch.*

Ch. J. that, where a feigned Issue is sent by a Court of Equity to be tried in a Court of Law, Costs do not follow the Verdict; because the Matter goes back for the Consideration of the Court of Equity: But that, where a feigned Issue is ordered by a Court of Law, Costs ought always to follow the Verdict.

Sayer 229.
Rex v. Nichols and Another.

A *Mandamus* having been awarded, whereby the Defendants, Justices of the Peace, were commanded to appoint Overseers of the Poor for *Walsal Foreign*, the Return was; that *Walsal Foreign* is not a distinct Division from *Walsal Borough*. Upon a Rule to shew Cause, why an Information should not be filed against the Defendants for a false Return, a feigned Issue was, with Consent, ordered, to try, whether *Walsal Foreign* be a distinct Division from *Walsal Borough*? And it was inserted in the Rule for the feigned Issue, that Costs shall abide the Event of the Trial. It being found by the Verdict, that *Walsal Foreign* is a distinct Division from *Walsal Borough*; and a peremptory *Mandamus* being awarded, the Question was, whether

ther the Defendants ought to pay the Costs of the Rule for the Information, which were incurred before the feigned Issue was ordered ? It was holden that they ought not ; and by *Ryder Ch. J.* it has been said ; that, if the Rule for the Information had been made absolute, and there had been a Verdict against the Defendants, the Court, unless they would have consented to go before the Master, would, as has in some Cases been done, have set a Fine so large, that the third Part thereof might have been sufficient to reimburse the Prosecutor his Costs, or at least a considerable Part thereof ; and it has been inferred ; that, as the Question would have been the same upon the Information, as it was upon the feigned Issue, the Costs of the Rule for the Information ought to be paid. But all this proceeds upon a Mistake ; for, as the Question upon the Information would, in Effect, have been a Question concerning a civil Right, namely, whether *Walsal Foreign* ought to have separate Overseers ? The Court, although there had been a Verdict
against

against the Defendants, and they had refused to go before the Master, would not have set a large Fine.

Sayer 253.
Rex v. Grif-
fiths.

Upon a Motion for an Attachment for a Rescue, a feigned Issue was ordered, to try, whether the Defendant had been guilty of a Rescue? A Verdict being found for the Defendant, the Question was, whether he ought to have the Costs of the Motion, as well as the Costs of the feigned Issue? It was holden, that he ought only to have the Costs of the feigned Issue; and by the Court: There is no Difference, between the present Case and the Case of a feigned Issue, ordered upon a Rule to shew Cause why an Information should not be filed; and it has been frequently holden; that in the latter Case only the Costs of the feigned Issue ought to be paid.

MS. Rep.
Thomas v.
Powell, East.
31 G. 2. in
K. B.

Upon a Rule to shew Cause, why an Information, in the Nature of a *Quo Warranto*, should not be filed against the Defendant, a feigned Issue was, by Consent, ordered. The Issue being found for the Prosecutor, a Question arose, whether

whether he ought to have any Costs, incurred before the ordering of the feigned Issue? It was holden, that he ought not; and by the Court: It has been holden; that, if upon a Rule to shew Cause, why an Information for a Misdemeanor should not be filed, a feigned Issue be ordered, Costs are only to be allowed from the Time of ordering the feigned Issue; and the same Rule ought to be observed, as to the Allowance of Costs in the present Case, as where a feigned Issue is ordered upon a Rule to shew Cause, why an Information for a Misdemeanor should not be filed.

C H A P. XXI,

Of Costs, where Money has been brought into Court.

IF the Plaintiff take Money out of Court, which has been brought in upon a Plea of Tender, the Defendant is entitled to Costs.

The common Rule, for Leave to bring Money into Court, is seldom granted, without annexing the Condition of paying Costs: But, upon the particular Circumstances of a Case, the Court will grant such Rule, without annexing that Condition.

MS. Rep.
Johnson v.
Holditch,
East. 31 G. 2.
in K. B.

In an Action of Debt for Rent, it appeared; that there had been a Tender of the Rent before it was due; that the Plaintiff had kept out of the Way all the Day on which it did become due,
in

in order to deprive the Defendant of an Opportunity of tendering the Rent that Day; and that the Action was commenced the next Day. The Defendant, who had before obtained the common Rule to bring Money into Court with Costs, did afterwards obtain another Rule for the Plaintiff to shew Cause, why, instead of receiving Costs, he should not pay Costs to the Defendant? The latter Rule was afterwards discharged: But so much of the former Rule, as related to Costs, was discharged likewise; and by Lord *Mansfield* Ch. J. upon the particular Circumstances of a Case, the Court has a Power, although the general Rule be otherwise, to give Leave to bring Money into Court upon the common Rule without Costs, and the present, in which the Plaintiff kept out of the Way on Purpose to avoid a Tender of the Rent, is a proper Case to give such Leave in. It is, in the general, of Course to allow Costs, where Leave is given to amend: But the Court may, upon the particular Circumstances of a Case, give Leave to amend without Costs. And by *Denison*

J. the Court has certainly a Power, where the Justice of a particular Case requires it, to dispense with a Part of one of it's Rules, which can only be adapted to general Cases. And by *Foster* J. there is, perhaps, no Case, where Costs are more generally allowed than upon the granting of a new Trial; and yet a Case may be so circumstanced, as to make it proper for the Court to grant a new Trial, without annexing the Condition of paying the Costs of the former Trial. And by *Wilmot* J. the Circumstances of this Case are so peculiarly hard, that the Court ought to go as far as by the Rules of Law it can in granting Relief. If the first Application had been, for Leave to bring Money into Court upon the common Rule without Costs, I should have been for giving such Leave; and I see no Reason, why it should not be now given.

¹ Barn. 198,

^{201.}

² Barn. 230.

If a Plaintiff, who has proceeded in his Action after Money was brought into Court upon the common Rule, do afterwards move for Leave to take the Money out, the Court will not give him

Leave to do this, without paying the Costs of the Defendant, subsequent to the bringing of it in.

And the Court did in one such Case order ; that the Defendant's Costs should be paid out of the Money brought in, if it were sufficient for that Purpose ; and if it were not, that the Plaintiff should make good the Deficiency, before the Proceedings in the Action should be stayed.

2 Barn. 235.
Bate v. Crane.

It may from the last mentioned Case, and from divers other Cases, be inferred ; that, notwithstanding a Plaintiff has proceeded in his Action, after Money was brought into Court upon the common Rule, he is entitled to Costs to the Time of bringing it in.

1 Barn. 198.
201.
2 Barn. 230.

But it has in one Case been holden ; that if a Plaintiff have proceeded in his Action, after Money was brought into Court upon the common Rule, he is not entitled to Costs to the Time of bringing it in ; and by the Court : By proceeding in the Action, after Money

Sayer 196.
Barwick v.
Symonds.

was brought into Court upon the common Rule, the Plaintiff forfeited his Right to Costs; it being a Part of the common Rule, that, if the Plaintiff will not accept of the Money brought into Court, with Costs to be taxed by the Master, in full Discharge of the Suit, the said Money shall be stricken out of the Declaration, and be paid out of Court to the Plaintiff; and upon the Trial of the Issue, the Plaintiff shall not be permitted to give Evidence as to that Money.

The old Form, of the common Rule for bringing Money into Court, being only upon the Condition of paying Costs; the Court will not grant an Attachment upon such Rule, although the Costs are not paid.

Str. 1220.
Hand v.
Dinely.

But the Plaintiff, notwithstanding he has taken the Money out of Court, may proceed in his Action, in Case the Costs be not paid; and will, in Case he obtain a Verdict, be entitled to the whole Costs of the Action; although the Verdict be for a lesser Sum than he took out of Court.

For

For some Years past, the old Form, of the common Rule for bringing Money into Court, has been so altered in the Court of Common Pleas, as to be obligatory upon the Defendant for the Payment of Costs; and consequently, this Court will now grant an Attachment for Non-payment thereof.

2 Barn. 227.
Scarall v.
Horton, Mich.
14 G. 2.

It appears, from a Case subsequent to the Alteration in the Court of Common Pleas; that the old Form, of the common Rule for bringing Money into Court, was at that Time adhered to in the Court of King's Bench.

Str. 1220.
Hand v.
Dinely, Hil.
18 G. 2.

And it does not appear, from any printed Case, that the old Form has been since departed from in this Court.

C H A P. XXII.

In what Cases, the Court will make a Rule for Staying the Proceedings in an Action, until a responsible Plaintiff shall be named, or until Security shall be given for the Payment of Costs.

2 Barn. 149.
Dunham v.
Percival.

TH E Practice of making a Rule, to stay the Proceedings in an Action of Ejectment, brought upon the Demise of an Infant, until a responsible Plaintiff shall be named, or until Security shall be given for the Payment of Costs, commenced in the Court of King's Bench : But the same has been since done by the Court of Common Pleas.

2 Barn. Sup.
14. Larmer v.
Searle.

Upon an Affidavit of the Death of the Lessor of the Plaintiff in an Action
of

of Ejectment, a Rule was made for the Plaintiff's Attorney to shew Cause, why the Proceedings should not be stayed, until Security shall be given for the Payment of Costs. The Opinion of the Court upon shewing Cause was; that such Security ought to be given, and the Plaintiff's Attorney did give it.

An Action of Ejectment being brought, upon the Demise of a Person who resided in the Island of *Antigua*, the Court was moved; that the Proceeding might be stayed until Security shall be given for the Payment of Costs. The Court had some Doubt, whether a Rule of this Kind ought to be made, unless the Lessor of the Plaintiff be an Infant: But a Rule to shew Cause was granted, which, no Cause being shewn, was afterwards made absolute.

MS. Rep.
Cufach v.
Jones, Hil.
33 G. 2.
in K. B.

In a subsequent Case, a Rule of the same Kind was made in an Action of Ejectment, brought upon the Demise of a Person who resided in *Ireland*.

MS. Rep.
Lucas v. Ful-
ford, Hil.
1 G. 3. in
K. B.

An

MS. Rep.
Pike v. Cor-
bin. Hil.
26 G. 2. in
K. B.

An Action, for the mesne Profits of certain Premises, being brought in the Name of the nominal Plaintiff, who had recovered in an Action of Ejectment, brought for the same Premises, the Court made a Rule for staying the Proceedings, until a responsible Plaintiff shall be named, or Security shall be given for the Payment of Costs.

Str. 1206.
Real v. Mac-
ky.

It may be inferred, from what is said in one Case; that the Court will make a Rule for staying the Proceedings in an Action *Qui tam*, until a responsible Plaintiff shall be named, or Security shall be given for the Payment of Costs.

2 Barn. 101.
Shindler v.
Roberts,
East. 12 G. 2.

In an Action, for the Penalty inflicted for having acted as a Commissioner of the Land Tax without being properly qualified, the Court was moved; that the Proceedings might be stayed, until Security shall be given for the Payment of Costs. No Rule was made; and by the Court: The Plaintiff is a visible Person, and has a Right to bring the Action.

In

In an Action brought by a Merchant, who resided at *Dunkirk*, the Court was moved; that the Proceedings might be staid, until Security shall be given for Payment of Costs. No Rule was made; and by the Court: The making of such Rule would affect Trade; in as much as it would exclude Foreigners from obtaining Justice in our Courts.

1 Wilf. 266.
Lami v.
Sewell.

In an Action of *Assumpsit*, brought by a *Swede* for Money due for Freight, the Court was moved; that the Proceedings might be stayed, until Security shall be given for the Payment of Costs. No Rule was made; and by the Court: The compelling of a Foreigner to give such Security, might affect Trade; for, as Foreigners would very often not be able to find Security, it would amount to the shutting up of our Courts against them.

Str. 1206.
Real v. Mac-
ky.

An Action being brought by Mrs. *Mingotti*, in the Name of her Husband, a Foreigner, for Money due to herself, as a Salary for singing at the Opera-House, the Court was moved; that the
Pro-

MS. Rep.
Mingotti v.
Drummond.
Hil. 30 G. 2.
in K. B.

Proceedings might be stayed until Security shall be given for the Payment of Costs. No Rule was made; and by the Court: She has no other Way than by such Action to recover her Salary.

MS. Rep.
Maxwell v.
Mayer. Trin.
33 G. 2. in
K. B.

In an Action against a Justice of the Peace, for having convicted the Plaintiff illegally, the Court was moved, upon an Affidavit that the Plaintiff was a *Scotchman*, and resided in *Scotland*; that the Proceedings might be stayed, until Security shall be given for the Payment of Costs. To support the Motion it was said; that the Process of the Court will not reach the Plaintiff. No Rule was made; and by the Court: This is at the utmost no more than the Case of an Action brought by a Foreigner; in which the Court never makes such Rule.

C H A P. XXIII.

Of Costs, where Leave is given
to amend.

WHEN the Court gives either Party leave to amend, it is the general Rule, to annex the Condition of paying Costs.

But the Court has sometimes given Leave to amend without Costs.

Leave was given to amend a Fault in a Writ of Error without Costs. Str. 863.
Aland v. Ma-
son.

There was a Variance between the Writ of Error and the Record; but neither Party would move to amend, for fear of paying Costs. The Variance being observed by the Court, the Court said; that the 5 G. 1. c. 13. would warrant their amending it, which they did without Costs. Str. 902.
Gardner v.
Merret.

The Amendment of a Joindre in Demurrer being rendered necessary by a mere *Vitiam Clerici*, Leave was given to amend without Costs. MS. Rep.
Ridge v. Ir-
ton, East.
24 G. 2. in
K. B.

After

MS. Rep.
Rex v. Phil-
lips. Hil.
32 G. 2.

After the Prosecutor, in an Information in the Nature of a *Quo Warranto*, had replied, the Defendant obtained Leave to amend his Plea, upon Payment of Costs: But the Amendment, by which more was stricken out than put in, did not deface the Record, nor make any considerable Alterations in the Replication of the Prosecutor necessary. As the Master had, upon a Taxation of Costs, only allowed such Costs as were necessarily occasioned by the Amendment of the Plea, a Question arose, whether the Prosecutor ought to be allowed Costs as for a Replication *de novo*? It was holden, that he ought only to have the Costs, which he was necessarily put to by the Amendment of the Plea; and by Lord *Mansfield* Ch. J. it is certainly true, that when a Defendant has Leave to amend his Plea, the Plaintiff has a Right to reply *de novo*, if it be judged proper so to do; and consequently, he ought, at all Events, to be allowed the Expence of advising with Council as to the Propriety of replying *de novo*. But if the Plaintiff, ultimately determining not to reply *de novo*,

nov, do only make some Alterations in his Replication, and the making of these do not, as is the present Case, deface the Record, he ought not to be allowed Costs as for a Replication *de novo*; for the Court will never suffer one Party to load the other, to whom Leave has been given to amend upon Payment of Costs, with any other Costs, than such as are necessarily occasioned by the Amendment.

After a Writ of Error is brought, the Court, in which the Judgment is, will not give the Defendant in Error Leave to amend the Record, without paying the Costs of the Amendment and of the Writ of Error; in Case the Plaintiff in Error do not proceed in the Suit upon the Writ of Error after the Amendment: But if he do proceed after the Amendment, the Court will not oblige the Defendant to pay the Costs even of the Amendment; it being from thence clear; that the Plaintiff did not rely entirely upon the Error, which has been amended.

3 Lev. 344.
Nicolas v.
Chapman.
Salk. 49.

C H A P.

C H A P. XXIV.

Of Costs, where a Plaintiff does not proceed to the Execution of a Writ of Enquiry, pursuant to Notice.

Str. 317.728.

TH E Practice of allowing Costs, in Case the Plaintiff has not proceeded to the Execution of a Writ of Enquiry, pursuant to Notice, commenced in the Court of King's Bench.

Ca. Pr. in
C. B. 86.
1 Barn. 90,
96, 155.

The Court of Common Pleas did not allow Costs in such Case, for some Years after it was done by the Court of King's Bench.

By a Rule of the Court of Common Pleas, of *Trin.* 13 G. 2. it is ordered:
“ That where Notice is given of the
“ Execution of a Writ of Enquiry, and
“ not countermanded in Time, the
“ Defendant shall be entitled to Costs
“ for not executing such Writ; in the
“ same Manner as a Defendant is now
“ entitled to Costs, from a Plaintiff
“ who does not proceed to the Trial of
“ an Issue after Notice is given.”

C H A P.

C H A P. XXV.

Of Costs, where, after Issue is joined, the Trial of a Cause is delayed.

BY the 14 G. 2. c. 17. *par.* 1. after reciting; that great Inconveniences have arisen to the Subjects of this Kingdom, by delaying the Trials of Causes between Party and Party after Issue is joined, it is enacted: “ That
 “ where any Issue shall be joined in any
 “ Action or Suit at Law, in any of his
 “ Majesty’s Courts of Record at *West-*
 “ *minster*, the Court of Great Session for
 “ the Principality of *Wales*, the Court
 “ of Great Session for the County Pa-
 “ latine of *Chester*, the Court of Com-
 “ mon Pleas for the County Palatine
 “ of *Lancaster*, or the Court of Pleas
 “ for the County Palatine of *Durham*,
 “ and the Plaintiff or Plaintiffs in any
 “ such Action shall neglect to bring
 : M such

“ such Issue to be tried, according to the
“ Course of the said Courts respectively,
“ it shall be lawful for the Judge or
“ Judges of the said Courts respectively,
“ at any Time after such Neglect, upon
“ Motion made in open Court, due
“ Notice having been given thereof, to
“ give the like Judgment in every such
“ Action or Suit as in Cases of Nonsuit;
“ unless the said Judge or Judges shall,
“ upon just Cause and reasonable Terms,
“ allow further Time or Times for the
“ Trial of such Issue; and if the Plain-
“ tiff or Plaintiffs shall neglect to try
“ such Issue, within the Time or Times
“ so allowed, then in every such Case,
“ the said Judge or Judges shall proceed
“ to give Judgment as aforesaid.”

And by the same Statute, *par.* 3. it is enacted: “ That the Defendant or De-
“ fendants shall, upon such Judgment,
“ be awarded his, her, or their Costs,
“ in any Action or Suit where he, she,
“ or they would, upon Nonsuit, be en-
“ titled to the same, and in no other
“ Action whatsoever.”

An

An Executor is not liable to Costs, although Judgment, as in the Case of a Nonsuit, be given against him ; because he would not have been liable thereto, in Case he had been nonsuited at the Trial of the Cause.

2 Barn. 102.
Howard v.
Radburn.

Upon a Rule to shew Cause, why Judgment, as in the Case of a Nonsuit, should not be given, it appeared ; that the Action was for a Penalty given by one of the Statutes for the Preservation of the Game ; that the Defendants had all joined in the Plea of Not guilty ; and that *Webster* had not joined in applying for Judgment, as in the Case of a Nonsuit. One Question was, whether the 14 G. 2. c. 17. whereby the Court is empowered to give Judgment, as in the Case of a Nonsuit, “ in Causes between Party and Party,” does extend to this Action ? It was holden, that it does ; and by the Court : As no Part of the Penalty, for which the present Action was brought, is given to the King, it is, notwithstanding a Moiety of the Penalty be given to the Poor of the Parish, in which the Offence was

Sayer 22.
Watson qui
tam v. Jack-
son, Boys and
Webster.

committed, a Cause between Party and Party. Another Question was, whether, as *Webster* has not joined in applying for Judgment, as in the Case of a Nonsuit, such Judgment ought to be given? It was holden, that it ought not; and by the Court: As all the Defendants have joined in the Plea of Not guilty, and one of them has not joined in the Application for Judgment, as in the Case of a Nonsuit, the Court ought not to give such Judgment.

Sayer 103.
Jennings qui
tam v. Wilson
and two o-
thers.

Upon a Rule to shew Cause, why Judgment, as in the Case of a Nonsuit, should not be given, it appeared; that one of the Defendants had not appeared; and that the two, who had appeared and pleaded, both joined in the Application. The Rule was discharged; and by the Court: It has been said; that this Case differs from the Case of *Watson qui tam v. Jackson and Others*, Hil. 25 G. 2. in as much as one of the Defendants, who had appeared and pleaded, did not in that Case join in the Application: But there is no Reason for the Court to depart, on Account
of

of this Difference, from what was then holden; for the Ground of the Opinion of the Court in that Case was; that, unless all the Defendants in an Action apply for Judgment, as in the Case of a Nonsuit, the Court ought not to give such Judgment. It has been said; that if Judgment, as in the Case of a Nonsuit, cannot be obtained, because one of the Defendants in an Action has not appeared, a vexatious Plaintiff may always make some Friend a Defendant, upon whom he can prevail not to appear, in order to prevent the obtaining of such Judgment by the Defendants who have appeared: But this Argument does not hold stronger in the present Case, than it would have done in the Case of *Watson qui tam v. Jackson and Others*; it being just as easy, for a vexatious Plaintiff to make some Friend a Defendant, upon whom, if he do appear, he can prevail not to apply for Judgment as in the Case of a Nonsuit; as it is to make some Friend a Defendant, upon whom he can prevail not to appear.

Sayer 110.
Wigan v.
Holmes.

Upon a Motion for Judgment, as in the Case of a Nonsuit, it appeared ; that a material Fact contained in the Return to a *Mandamus* was traversed ; and that Issue was joined upon the Traverse. *Wright* J. (*Lee* Ch. J. being absent) at first had some Doubt, whether the Statute, by which the Court is empowered to give Judgment, as in the Case of a Nonsuit, “ in Causes between Party and “ Party,” does extend to the Traverse of the Return to a *Mandamus* : But *Denison* J. observed ; that it is by the 9 *Ann.* c. 20. declared ; that, if any material Fact contained in the Return to a *Mandamus* shall be traversed, such further Proceeding shall be had thereupon, as if an Action had been brought for a false Return. A Rule was made to shew Cause ; which, no Cause being shewn, was afterwards made absolute.

Sayer 74.
Battie v.
Brown.

After one Rule to shew Cause, why there should not be Judgment, as in the Case of a Nonsuit, had been discharged, upon an Undertaking peremptorily to try the Cause at the next Assize, a second Rule was made to shew Cause, why

why there should not be such Judgment? Upon shewing Cause against the latter Rule, it appeared; that, after the Undertaking peremptorily to try the Cause, a Mistake had been discovered in the Declaration, which was for the Sale of a Gelding, whereas the Fact was, that the Plaintiff had sold a Mare to the Defendant; that this Mistake being discovered, and there being no Count for Goods sold, the Cause was not tried; and that Notice had been given, before the present Rule was obtained, of a Motion for Leave to amend the Declaration. The Rule was made absolute; and by *Wright J.* and *Denison J.* (*Lee Ch. J.* being absent) the Plaintiff ought to have been satisfied, that his Declaration was right, before he undertook peremptorily to try the Cause. But *Foster J.* said; that it would, in his Opinion, be rather too rigid a Construction of the 14 G. 2. c. 17. to hold, that the Plaintiff, under the Circumstances of this Case, was obliged to try his Cause at the next Assize.

2 Barn. 257.
Bentley v
Scott East.
26 G. 2.

It has been holden ; that as the 14 G. 2. c. 17. has not made any Difference between an Action of Replevin and other Actions, Judgment, as in the Case of a Nonsuit, may be given for the Defendant in an Action of Replevin.

MS. Rep.
Eggleton v.
Smith. East.
2 G. 3. in
K. B.

It has been since holden ; that the Defendant in an Action of Replevin ought never to have Judgment, as in the Case of a Nonsuit ; because, as he is himself an Actor, he might have carried down the Record, and have tried the Cause.

MS Rep:
Weller v.
Goyton and
Walker. Trin.
31 G. 2.
in K. B.

In an Action of Assumpsit against two, one of the Defendants suffered Judgment by Default. Upon a Motion by the other, for Judgment, as in the Case of a Nonsuit, it was holden ; that, so long as there is a subsisting Judgment against one of the Defendants, there cannot be Judgment, as in the Case of a Nonsuit, for the other ; and by the Court : The Way, for this Defendant to have obtained his Costs, was to have carried the Record down to Trial by Proviso ; in which Case, if he had obtained

tained a Verdict, that would have been a Discharge of the Judgment against the other Defendant, and he would then have been entitled to Costs.

A Defendant, after having received Costs, because the Plaintiff did not proceed to Trial pursuant to Notice, nor countermand, moved for Judgment as in the Case of a Nonsuit. No Rule was made; and by the Court: The Defendant ought not to have two Remedies; and as he has made his Election, to have Costs on Account of the Plaintiff's not proceeding to Trial, and has received them, he ought not to have Judgment as in the Case of a Nonsuit.

2 Barn 103.
Honiwül v.
Blatchford.
2 Barn. 251,
253.

The Court does usually order the Costs, of an Application for Judgment as in the Case of a Nonsuit, to be paid; in Case further Time be allowed for the Trial of an Issue. But, upon the particular Circumstances of a Case, the Court will allow further Time for the Trial of an Issue, without ordering the Costs, of the Application for Judgment as in the Case of a Nonsuit, to be paid.

The

2 Barn. Sup.
43. Hamp. v
Cuming.

The Plaintiff having obtained a Rule for a View, a View was had by four of the Jurors. The Cause was entered at the Assize, and the Plaintiff was willing to try it: But, as the Defendant would not consent thereto, the Cause could not be tried, because the View was not had by six of the Jurors. The Defendant having afterwards applied for Judgment, as in the Case of a Non-suit, further Time for the Trial of the Issue was allowed, without ordering the Costs of the Application to be paid; and by the Court: The Plaintiff has not been guilty of any Neglect. It was not his Fault, that the View was incomplete.

C H A P. XXVI.

Of Costs where a Plaintiff does not proceed to the Trial of a Cause pursuant to Notice.

BY Rules of the Courts of King's Bench and Common Pleas of *Mich.* 1654, it is ordered : " That if the Plaintiff give Notice of a Trial, and proceed not thereto, the Defendant upon Motion is to have the Costs of his Attendance ; unless the Plaintiff give the Defendant Warning in convenient Time, that he will not proceed, or shew Cause to be allowed by the Court in Excuse of such Costs."

By the 14 G. 2. c. 17. it is enacted :
" That in Case any Party shall have
" given Notice of the Trial of a Cause,
" at any Assize, or at any Sitting in
" London or Westminster, where the De-
" fendant

“ fendant lives forty Miles from the
 “ said Cities respectively, and shall not
 “ afterwards countermand the same in
 “ Writing, at least six Days before such
 “ intended Trial, every such Party shall
 “ shall be obliged to pay the like Costs
 “ and Charges, as if such Notice had
 “ not been countermanded.”

Ca. Pr. in
 C. B. 60.
 Duell v. Stow.

The Defendant having entered a *ne recipiatur*, the Evening next but one before the Day of the Sitting for which Notice of Trial was given, a Question arose, whether the Plaintiff ought to pay Costs for not proceeding to Trial pursuant to Notice? It was holden, that he ought; and by the Court: As the Plaintiff was guilty of a Default, in not entering his Cause in due Time, he ought to pay Costs, notwithstanding the Entry of the *ne recipiatur*.

Str. 797.
 Wilkinfon v.
 Pool.

The Defendant is liable to Costs, for not proceeding to the Trial of a Cause by Proviso, pursuant to Notice.

Pr. Reg. 405.
 Reading v.
 Grafton.

The Defendant gave Notice of Trial of a Cause by Proviso, and the Plaintiff likewise gave Notice of Trial. Neither
 pro-

proceeded to Trial, or gave Notice of countermand ; and each obtained a Rule for Costs, for not going to Trial pursuant to Notice. The Prothonotary had some Doubt, as to the Propriety of taxing Costs for both Parties : But the Opinion of the Court was ; that both were entitled to Costs.

The Defendant had obtained a Rule for Costs, for not going to Trial pursuant to Notice. The Plaintiff, who had not paid those Costs, gave a second Notice of Trial. Hereupon a Rule was made, for staying the Proceedings in the Cause, until the Costs, for not proceeding to Trial pursuant to the former Notice, shall be paid.

Pr. Reg. 406.
Packer v.
Walker.

Upon shewing Cause, against a Rule for Costs for not proceeding to Trial pursuant to Notice, it appeared ; that one material Witness, who had been served with a *Subpœna*, could not attend ; and that another was disabled from attending by a Fall from his Horse. The Rule was discharged ; because the Plaintiff had not been guilty of a wilful Neglect.

2 Barn 107.
Ogle v. Mos-
fat.

MS. Rep.
Strong on the
Demise of
Rolfe v. Har-
wood. Hil.
16 G. 3. in
C. B.

Upon a Rule to shew Cause, why the Plaintiff should not pay the Costs, for not proceeding to Trial pursuant to Notice, it appeared ; that after the Notice of Trial was given, the Defendant moved for a special Jury; that forty-eight Persons were nominated by one of the Prothonotaries ; and that the Defendant's Attorney neglected to attend to strike out twelve of them. The Matter being referred to the Prothonotaries, they reported ; that, as the not proceeding to Trial was occasioned by a Neglect of the Defendant's Attorney, in not attending to strike out twelve of the Persons nominated, the Defendant was not, in their Opinion, entitled to Costs. Upon this Report, the Rule was discharged.

C H A P. XXVII.

Of Costs, where a Cause is referred to Arbitrators.

AS Arbitrators have a Power of awarding the Costs of the Suit, they may award; that these shall be taxed by the proper Officer of the Court, in which the Suit is: The doing of this being nothing more than a Delegation of their Power to ascertain the Costs.

2 Barn. 140.
Furnis v.
Hallow.

If the Award of Arbitrators be in general Terms, that the Costs of the Suit shall be paid, the Costs may be taxed by the proper Officer of the Court in which the Suit is; it being a Maxim; that *Certum est quod certum reddi potest.*

2 Barn. 140.
Furnis v.
Hallow.

During the Trial of a Cause, it was agreed to withdraw a Juror; and that all Matters in Difference should be referred

1 Barn. 97.
Bracker v.
Cotton.

ferred to Arbitrators. Part of the Award being, that one of the Parties should have Costs to be taxed, the Question was, whether the Prothonotary ought to allow the Costs of the Reference? It was holden, that he ought not.

Pr. Reg. 45.
Carpenter v.
Joynes, Hil.
5 G. 2.

Upon a Reference to Arbitrators under an Order of *Nisi Prius*, they awarded the Costs of the Arbitration to be paid, as well as the Costs of the Suit. A Question arising, whether they had in this Case a Power to award the Costs of the Arbitration? It was holden, that they had; and by the Court: If a Reference be under a Bond for submitting to an Award, the Arbitrators cannot award any Costs subsequent to the Bond: But, if a Reference be under an Order of *Nisi Prius*, the Arbitrators may award the Costs subsequent to the Order.

2 Barn. 54.
Tynte v.
Every, East.
15 G. 2.

Arbitrators had awarded the Costs both of the Suit and of the Reference, and that these should be taxed by the Prothonotary. It was ordered by the Court;

Court ; that the Prothonotary should only allow Costs to the Time of the Reference. It may be inferred, from what was laid down in the preceding Case ; that the Reference in this Case was not under an Order of *Nisi Prius*.

Upon a Rule to shew Cause, why Costs should not be taxed for the Plaintiff, it appeared ; that the Cause was by a Rule of *Nisi Prius* referred to Arbitrators ; that a Verdict with Five Hundred Pounds Damages was, however, taken for the Plaintiff, as a Security for what should be awarded to be paid to him, and Costs ; and that the Sum of One Hundred and Fifty Pounds was awarded to be paid to the Plaintiff, without Costs. The Rule was made absolute ; and by the Court : As Costs were by the Rule of *Nisi Prius* to be, at all Events, paid to the Plaintiff, the Arbitrators had no Power to award, that he should not have Costs.

MS. Rep.
Barlow v.
Flint, Mich.
12 G. 3. in
C. B.

C H A P. XXVIII.

Of Costs, where a Cause, which was made a Remanet, or went off by Consent, at one Affize, is tried at a subsequent Affize.

Sayer 272.
Wheatly v.
Hall, East.
29 G. 2.

UPON a Rule to shew Cause, why the Defendant should not have the Costs of two Affizes, it appeared; that, at the first Affize, the Cause was made a Remanet by the Order of the Judge; and, that at the next Affize, there was a Verdict for the Defendant. The Rule was made absolute; and by the Court: It has been said; that in the Court of Common Pleas only the Costs of the latter Affize are in such Case allowed: But it is the Practice of this Court, to allow the Costs of both Affizes.

MS. Rep.
Sparrow v.
Turton, Trin.
7 G. 3. in
C. B.

A Cause had been made a Remanet at one Affize; because neither of the Parties

Parties would pray a *Tales*. The Cause being tried at the next Affize, and there being a Verdict for the Defendant, the Question was, whether he ought to have the Costs of the former Affize? It was holden, that he ought not; and by the Court: It has not been the Practice of this Court, to allow the Costs of the former Affize in such Case: But it appearing to the Court, that the Practice of the Court of King's Bench was different, it was ordered; that, for the Time to come, whenever a Cause goes off at one Affize, without Default of either Party, and is tried at a subsequent Affize, the Costs of the former Affize shall be allowed.

Upon a Rule to shew Cause, why the Taxation of Costs should not be reviewed, it appeared; that at one Affize the Cause was, by Consent, referred to Arbitrators; that, no Award being made in pursuance of the Reference, the Cause was tried at the next Affize; and that, upon a Taxation of Costs, the Costs of the former Affize were not allowed. The Rule was discharged; because the

MS. Rep.
Burchall v.
Bellamy, Hil.
11 G. 3. in
K.B.

Costs of the former Assize had never been allowed in this Court, unless the Cause were made a Remanet : But it appearing to the Court ; that the Court of Common Pleas had, of late Years, allowed the Costs of a former Assize in other Cases, as well as where a Cause was made a Remanet, it was ordered ; that, for the Time to come, whenever a Cause goes off at one Assize, without the Default of either Party, and is tried at a subsequent Assize, the Costs of the former Assize shall be allowed.

C H A P. XXIX.

Of the Costs of a Special Jury.

BY the 3 G. 2. c. 25. it is enacted :
 “ That the Party, who shall ap-
 “ ply for a special Jury, shall pay the
 “ Fees for the striking of such Jury;
 “ and shall not have any Allowance for
 “ the same, upon a Taxation of Costs.”

It was holden, first by the Court of
 Common Pleas, and afterwards by the
 Court of King's Bench ; that the 3 G. 2.
 c. 25. does only extend to the Costs of
 striking a special Jury ; and that the
 other reasonable Costs, relative to the
 special Jury, are to be allowed to the
 Party obtaining a Verdict.

*Co. Fr. in
 C. B. 138.
 Sir. 1080.*

By the 24 G. 2. c. 18. after reciting ;
 that the 3 G. 2. c. 25. does only extend
 to the Fees for striking a special Jury ;
 by Reason of which special Juries have
 frequently been applied for in small and

N 3

trivial

trivial Causes, in order to burthen the other Party with the Expences thereof, it is enacted : “ That the Party, who
“ shall apply for a special Jury, shall
“ not only pay the Fees of striking such
“ Jury, but shall also pay all the Ex-
“ pences, occasioned by the Trial of
“ the Cause by such special Jury ; and
“ shall not have any further Allowance
“ for the same, upon a Taxation of
“ Costs, than such Person or Party
“ would be entitled unto, in case the
“ Cause had been tried by a common
“ Jury ; unless the Judge, before whom
“ the Cause is tried, shall immediately
“ after the Trial certify in open Court,
“ under his Hand upon the Back of the
“ Record, that the same was a Cause
“ proper to be tried by a special Jury.”

C H A P. XXX.

Of the Costs of Witnesses.

THE Costs on Account of a Witness, who was examined at the Trial of the Cause, are to be allowed; although such Witness were not served with a *Subpæna*.

The Costs on Account of a material Witness, who was served with a *Subpæna*, and did attend the Trial of the Cause, are to be allowed, although such Witness were not examined.

The Practice of the Court of Common Pleas is, to allow the Costs on Account of a material Witness, who did attend the Trial of the Cause; although such Witness were neither served with a *Subpæna*, nor examined. But it is not the Practice of the Court of King's Bench, to allow the Costs on the Account of any Witness, how material so-

ever he is sworn to have been, unless such Witness was served with a *Subpœna*, or examined.

Ca. Pr. in C.
B. 98.
Senhouse v.
Barnes.

A Question arising, whether the Costs on Account of a Witness, whom the Judge, being of Opinion that he was not a material Witness, would not permit to be examined, ought to be allowed? It was sworn by the Party, that he was a material Witness, and by the Attorney, that he was supposed by his Council to be so. The Court ordered the Expence of this Witness to be allowed.

2 Barn. 241.
Hester v.
Hall.

A Plaintiff, after giving Notice of Trial, gave a regular Notice of Countermand, and obtained a Rule to discontinue upon Payment of Costs. Between the Time of giving Notice of Trial, and that of giving Notice of Countermand, a material Witness for the Defendant, who resided in *London*, had set out for the Assize at *York*; a Question arising, whether the Costs on Account of this Witness ought to be allowed? It was holden; that, as the Notice of Countermand was regular, those Costs ought not to be allowed.

C H A P.

C H A P. XXXI.

Of Costs, where a Repleader is awarded.

IF a Repleader be awarded, on Account of the Immateriality of an Issue which has been tried, the Court will not allow Costs to either of the Parties; because both have been in Fault, the one in pleading an immaterial Plea, the other in joining Issue thereupon.

In an Action of Assumpsit, against an Administratrix, the Defendant, instead of pleading that her Testatrix did not promise, pleaded that she herself did not promise. Issue being joined upon the Plea, a Repleader was, after the Trial of the Cause, awarded without Costs, on Account of the Immateriality of the Issue.

2 Ventr. 196.
Anon.

The Defendant, in an Action of Trover, pleaded *non Assumpsit*. Issue was joined

1 Barn. 99.
Noble v.
Lancaster.

joined upon the Plea ; the Cause was tried ; and a Verdict was found for the Plaintiff. A Repleader being awarded, on Account of the Immateriality of the Issue, and Judgment by Default being afterwards signed, a Question arose, whether the Plaintiff ought to be allowed the Costs of the immaterial Pleading, or of the Trial ? It was holden, that he ought not to be allowed either ; and by the Court : As both Parties were in Fault, neither ought to have the Costs of the immaterial Pleading, or of the Trial.

C H A P. XXXII.

Of Costs, where a new Trial is granted.

IT is in one Book said ; that if a new Trial be granted, on Account of an Irregularity at the former Trial, the Costs of the former Trial ought not to be paid. 12 Mod. 370.

The Jury, after having sat up all Night, agreed in the Morning, to put two Papers marked *P* and *D* into a Hat, and to draw Lots ; and that, if the Paper marked *P* were drawn, they would find a Verdict for the Plaintiff ; if the Paper marked *D*, a Verdict for the Defendant. The Paper marked *P* being drawn, they found a Verdict for the Plaintiff ; the finding of which happened, in the Opinion of the Judge, to be warranted by the Evidence. It was holden, that a new Trial ought to be granted ; and the only Question was, whether Str. 642.
Hale v. Cove.

whether the Plaintiff ought to be allowed the Costs of the former Trial? The Court at first inclined to be of Opinion, that he ought: But it was afterwards ordered; that those Costs should abide the Event of the new Trial.

It was formerly holden; that a new Trial could not be granted upon the Merits of a Cause, without the Condition of paying the Costs of the former Trial.

12 Mod. 370.
Anon.
Pasch. 12 W.
3.

It is said in one Case; that, if a new Trial be granted upon the Merits of a Cause, the Condition of paying the Costs of the former Trial must be annexed.

Pr. Reg. 408.
Brockhurst v.
Copson, Mic.
2 G. 2.

Upon a Motion for a new Trial, the Judge, before whom the Cause was tried, reported; that the Verdict was contrary to Evidence, and contrary to his Direction; and that, if in any Case it were proper to grant a new Trial, without the Condition of paying the Costs of the former Trial, this was, in his Opinion, a proper Case to do it in. A new Trial was refused; the Court being unanimously of Opinion; that a
new

new Trial cannot be granted, without the Condition of paying the Costs of the former Trial.

A new Trial has of late Years been frequently granted upon the Merits of a Cause, without the Condition of paying the Costs of the former Trial.

Upon the Trial of an Action of false Imprisonment, against a Justice of the Peace, it was proved; that the Action was commenced within six Months after the End of the Imprisonment, but not within six Months after the Day of it's Commencement. It was ruled by *Willes* Ch. J. before whom the Cause was tried, that the Action was not commenced within the Time limited by the 24 G. 2. c. 44. and the Plaintiff was nonsuited. A new Trial was granted, without the Condition of paying the Costs of the former Trial.

MS. Rep.
Pickersgill v.
Palmer, Hil.
2 G. 3. in C.
B.

Two Bills of Exchange, drawn by Colonel *Clive* upon the East India Company, payable to *Campbell*, or order, had been indorsed by *Campbell* to *Ogilby*; but the Words *or Order*, were not add-

MS. Rep.
Edie and Lard
v. The East
India Com-
pany, Trin.
1 G. 3.
in K. B.

ed

ed in the Indorsement of one of the Bills. Both the Bills being afterwards indorsed by *Ogilby* to *Edie* and *Lard*, or *Order*, an Action of *Assumpsit* was brought upon them. There being no Doubt, as to the Bill which was indorsed to *Ogilby*, or *Order*, the Jury found for the Plaintiffs, as to the Count wherein that Bill was declared for. As to another Count, wherein the Bill indorsed to *Ogilby only* was declared for, they found for the Defendant; but their Verdict, as to that Count, was grounded entirely upon Evidence, that by the Usage of Merchants, that Bill was not assignable to the Plaintiffs; because the Words *or Order* were not added in the Indorsement from *Campbell* to *Ogilby*. Upon a Motion on the Part of the Plaintiff for a new Trial, Lord *Mansfield* Ch. J. before whom the Cause was tried, reported; that he told the Jury, that by the general Law, every Indorsement of a Bill of Exchange, does follow the Nature of the original Bill; and consequently, that if a Bill be drawn payable to *J. S. or Order*, an Indorsement by *J. S.* to *J. N.* will be a good Assignment to *J. N. and his Order*,

der, notwithstanding the Words *or Order* are not added in the Indorsement to *J. N.* but that, if they were fully satisfied from the Evidence, that the Words *or Order*, are, by the Usage of Merchants, necessary to the enabling of an Indorsee to assign a Bill of Exchange, they ought to find for the Defendants, as to that Bill in the Indorsement of which those Words are not added. His Lordship concluded with saying; that at the Trial of the Cause he was of Opinion, that Evidence of the Usage of Merchants was admissible; but that, having since looked into the Cases upon the Point, and considered the Matter with great Attention, he is now clearly of Opinion; that he ought not to have admitted such Evidence; and consequently, that, as the Verdict upon that Count, which is found for the Defendant, was entirely grounded upon Evidence of the Usage of Merchants, a new Trial ought to be granted. The other Justices being of the same Opinion; the remaining Consideration was, whether the new Trial ought to be granted, without the Condition of paying the Costs of the former Trial? It was holden,

den, that it ought; and by the Court: As a Verdict must, if set aside, be set aside generally; and this Verdict is agreed to be right, as to that Count which is found for the Plaintiff, there is no Reason, that he should pay the Costs of the former Trial.

3 Will. 338.
Rackham v.
Jesup and
Thompson.

Upon a Rule to shew Cause, why a Nonsuit should not be set aside, and why a new Trial should not be had? It appeared; that the Nonsuit was upon a Mistake of the Judge in a Point of Law. A new Trial was granted, without the Condition of paying the Costs of the former Trial.

Str. 300.
Davila v.
Herring.

Upon the Trial of a Cause, a Case was reserved, which was afterwards argued: But, the Court not being able to give Judgment, for want of sufficient Facts being stated, the Parties, at the Recommendation of the Court, agreed to go to a new Trial. As the Plaintiff was nonsuit upon the second Trial, a Question arose, whether the Defendant ought to have the Costs of the former Trial? It was holden, that he ought to have the Costs of both Trials.

C H A P.

C H A P. XXXIII.

Of Costs, in a Suit upon a Writ
of *Scire Facias*.

COSTS were not recoverable, before the making of the 8 & 9 *W. 3. c. 11.* in a Suit upon a Writ of Prohibition.

The Plaintiff, in such Suit, could not recover Costs under the Statute of *Gloucester, c. 1.* because he did not recover any Damages. Nor could the Defendant, in such Suit, recover Costs; because the 4 *Ja. 1. c. 3.* did not enable him to recover Costs in any Action, except such wherein the Plaintiff might have recovered Costs.

By the 8 & 9 *W. 3. c. 11.* it is enacted: " That in all Suits upon Writs
" of *Scire Facias*, the Plaintiff obtain-
O ing

“ ing Judgment, or any Award of Exe-
 “ cution, after Plea pleaded or Demur-
 “ rer joined therein, shall recover his
 “ Costs of Suit; and if the Plaintiff
 “ shall become Nonsuit, or suffer a Dis-
 “ continuance, or a Verdict shall pass
 “ against him, the Defendant shall re-
 “ cover his Costs, and have Execution
 “ for the same, by *Capias ad Satisfacien-*
 “ *dum, Fieri Facias, or Elegit.*”

Ca Pr. in
 C. B. 74.
 Huer v.
 Whitehead.

It has been holden ; that, if Leave
 be given for a Plaintiff to quash his Writ
 of *Scire Facias*, before the Defendant
 has pleaded, the Defendant is not en-
 titled to Costs.

Str 628.
 Pocklington
 v. Peck

The Defendant having pleaded in A-
 batement to a Writ of *Scire Facias*, the
 Plaintiff moved for Leave to quash his
 Writ. Leave was given to do this
 without paying Costs ; and by the
 Court: The Law is the same in the
 Case of a Writ of a *Scire Facias*, as in
 that of any other Writ; in which, if
 the Writ be abated, the Plaintiff is not
 liable to Costs.

If

If the Defendant in a Suit upon a Writ of *Scire Facias* be an Executor, he is not liable to Costs ; for the 8 & 9 *W. 3. c. 11.* by which Costs are given in a Suit upon Writ of *Scire Facias*, does not extend to an Executor.

Str. 188.
Bellew v.
Aylmer.

It follows, that if an Executor be Plaintiff in a Suit upon a Writ of *Scire facias*, he is not liable to Costs.

C H A P. XXXIV.

Of Costs, in a Suit upon a Writ
of Error.

COSTS were not recoverable in a Suit upon a Writ of Error, before the making of the 3 *H. 7. c. 10.*

The Plaintiff, in such Suit, could not recover Costs under the Statute of *Gloucester, c. 1.* because he did not recover any Damages. Nor could the Defendant, in such Suit, recover Costs in such Suit; because a Defendant could not, before the making of the 3 *H. 7. c. 10.* recover Costs in any Case, except a Suit upon a Writ of Right of Ward.

By the 3 *H. 7. c. 10.* after reciting; that the Plaintiff or Demandant, who hath Judgment to recover, is often delayed of Execution; for that the Defendant or Tenant, or other who is bound by the said Judgment, sueth a
Writ

Writ of Error to annul and reverse the said Judgment, it is enacted: "That
 " if any Defendant or Tenant, or any
 " other who shall be bound by any
 " Judgment, sue, afore Execution had,
 " any Writ of Error to reverse such
 " Judgment, in Delay of Execution;
 " that then, if the same Judgment be
 " affirmed in the said Writ of Error, or
 " the said Writ of Error be discontinu-
 " ed in Default of the Party, or any
 " Person, that sueth a Writ of Error,
 " be nonsuited in the same, the Person
 " against whom it is sued shall recover
 " his Costs and Damage, for his Delay
 " and wrongful Vexation in the same,
 " by Discretion of the Justices afore
 " whom the said Writ of Error is sued."

If a Writ of Error be brought after Execution, the Defendant in Error cannot recover Costs; for the 3 *H. 7. c. 10.* only gives Costs to a Defendant in Error where Execution has been delayed by the Writ of Error.

*Cro. Ja. 636:
 Eardley v.
 Turnock.*

By the 3 *Ja. 1. c. 8.* it is enacted:
 " That no Execution shall be stayed, by

“ any Writ of Error, or *Supersedeas*
 “ thereupon, to be sued for the re-
 “ versing of any Judgment, in any Ac-
 “ tion or Bill of Debt upon any single
 “ Bond or Debt, or upon any Obliga-
 “ tion with Condition for the Payment
 “ of Money only ; or in any Action or
 “ Bill of Debt for Rent, or upon any
 “ Contract ; unless such Person, in
 “ whose Name such Writ of Error shall
 “ be brought, with two sufficient Sure-
 “ ties, such as the Court shall allow
 “ of, shall be bound unto the Party for
 “ whom such Judgment is given, by
 “ Recognizance to be acknowledged in
 “ the same Court, in double the Sum
 “ adjudged to be recovered by the said
 “ Judgment, to prosecute the said Writ
 “ of Error with Effect ; and also to sa-
 “ tisfy and pay, if the said Judgment
 “ be affirmed, all the Debts, Damages
 “ and Costs, adjudged or to be adjudged
 “ upon the former Judgment, and also
 “ all Costs and Damages, to be award-
 “ ed for the delaying of Execution.”

Cro. Eliz. 588
 Penruddock
 v. Erington.

It has been doubted ; whether Costs
 are recoverable in a Writ of Error in
 the

the Exchequer-Chamber? Because the 27 *Eliz. c. 8.* which gives this Writ of Error, is silent as to Costs.

It is laid down in divers Cases; that Costs are recoverable in a Writ of Error, in Case the Judgment be affirmed; although Costs were not recoverable in the original Action.

In one Case it is laid down; that, if a Writ of Error be brought upon a Judgment in an Action of *Quare Impedit*, and the Judgment be affirmed, the Defendant in Error ought to have Costs, notwithstanding Costs were not recoverable in the original Action.

Dyer 77.
Heuslowe v.
The Bishop
of Salisbury.
Mich. 6 E. 6.

In another Case it is laid down; that, as Costs and Damages are by the 3 *H. 7. c. 10.* given generally, on Account of the Delay of Execution occasioned by a Writ of Error, if a Writ of Error be brought upon a Judgment in an Action of *Formedon*, and the Judgment be affirmed, the Defendant is entitled to Costs for the Delay of Execution, although Costs were not recoverable in the original Action.

Cro. Eliz. 617.
Graves v.
Short, Hil.
40 Eliz
5 Rep. 101.
S. C.

Cro. Eliz.
649. Penrud-
dock v. Clerk.
Mich. 40 Eliz.
5 Rep. 101.
S. C.

In another Case it is laid down ; that the Defendant in a Writ of Error, brought upon a Judgment in a Suit upon a Writ of *Quod permittat*, ought to have Costs, in Case the Judgment be affirmed ; although Costs were not recoverable in the original Suit ; for that Costs are to be paid in every Case, wherein a Writ of Error is brought before Execution, and the Judgment is affirmed.

Cro. Car. 145.
Anon. Mich.
4 Car. 1.
Cro. Car. 175.
The Earl of
Pembroke v.
Boftock.
Mich. 5 Car. 1.

The same is laid down in two other Cases, in which Writs of Error were brought upon Judgments in Actions of *Quare Impedit* ; and in the former of these the Authority of the Case of *Heuslowe v. The Bishop of Salisbury* is recognized.

The contrary of what is laid down in these Cases, has been holden in divers subsequent Cases.

Cro. Car. 425.
Smith v.
Smith, Mich.
10 Car. 1.

A Writ of Error being brought in the Court of King's-Bench, upon a Judgment of the Court of Common Pleas in an Action of *Formedon*, and the
Judg-

Judgment being affirmed, the Question was, whether the Defendant in Error ought to have Costs? It was holden, that he ought not; and by the Court: As Costs were not recoverable in the original Action, the Delay of Execution, occasioned by the Writ of Error, was only as to the Land; and consequently the Defendant is not entitled to Costs under the 3 H. 7. c. 10.

A Writ of Error being brought, upon a Judgment of a Court of Great Sessions in *Wales*, and the Judgment being affirmed; it was holden, upon the Authority of *Smith v. Smith*, Cro. Car. 425. that the Defendant in Error ought not to have Costs; because Costs were not recoverable in the original Action.

1 Lev. 146.
Winne v.
Lloyd, Mich.
16 Car. 2.

An Administrator brought a Writ of Error, upon a Judgment in Ejectment against his Intestate, and the Judgment was affirmed. It was holden; that he ought not to pay Costs, notwithstanding the Delay of Execution occasioned by the Writ of Error.

1 Ventr. 166.
Legge v. Ri-
chards, Mich.
23 Car. 2.

An

4 Mod. 245.
Gale v. Till.
Mich. 5 W.
& M. Carth.
261. S. C.

An Administrator brought a Writ of Error, upon a Judgment against himself as Administrator, and the Judgment was affirmed. It was holden that he ought not to pay Costs; because he was not liable to Costs in the original Action.

In a Case, subsequent to all the Cases last mentioned, the Doctrine of the former Cases is recognized.

Str. 1084.
Ferguson v.
Rawlinson.
Hil. 11 G. 2.

A Writ of Error being brought in the Court of King's Bench, upon a Judgment of the Court of Common Pleas, in an Action on the Statute against Usury, and the Judgment being affirmed, it became a Question, whether, as the Defendant in Error could not have recovered Costs in the original Action, he ought to have the Costs of the Suit upon the Writ of Error? It was upon Consideration holden; that he was entitled thereto by the express Words of the 3 H. 7. c. 10. the Writ of Error having been brought *in Delay of Execution*.

Str. 1072.
Saltern v.
Wynne.

After a Writ of Error had been brought by an Executor, upon a Judgment against

gainst his Testator, in an Action of Debt upon a Bond, and the Judgment had been affirmed, the Executor moved upon the 4 *Ann. c. 16.* for Leave to pay the Principal and Interest due upon the Bond, and the Costs of the original Action. It was insisted, on the Part of the Defendant in Error; that, as the Application of the Defendant was for a Favour, it being to save a Penalty, it was reasonable, that he should pay the Costs, which he had put the Plaintiff to by the Writ of Error; because, if the Plaintiff were to take out Execution, a Court of Equity would not punish him, for taking those Costs out of the Penalty. It was holden; that, as by Law an Executor is not liable to pay the Costs of a Suit upon a Writ of Error, the Court cannot order those Costs to be paid in the present Case, although there be a Penalty.

But in another Case, where a Writ of Error was brought by an Executor, upon a Judgment after a *Devastavit*, and the Judgment was affirmed, it was holden; that the Executor ought to pay Costs.

Str. 977.
Cafwell v.
Norman.

If

By the 13 *Car. 2. st. 2. c. 2.* it is enacted : “ That if any Person or Persons shall sue, or prosecute any Writ of Error, for the Reversal of any Judgment, given after a Verdict in any Court of Record at *Westminster*, or in the Counties Palatine of *Chester*, *Lancaster* or *Durham*, or in any Court of Great Sessions in *Wales*, and the said Judgment shall afterwards be affirmed, then every such Person, or Persons, shall pay unto the Defendant, or Defendants, in the Writ of Error, his or their double Costs, to be assessed by the Court, where such Writ of Error shall be depending for the Delay of Execution.”

By the 4 *Ann. c. 16.* it is, for the sake of preventing of Vexation from suing out defective Writs of Error, enacted : “ That, upon the quashing of any Writ of Error, for Variance from the Record, or other Defect, the Defendant shall recover against the Plaintiff, or Plaintiffs, issuing such Writ his Costs, as he should have had if the Judgment had been affirmed, and

“to be recovered in the same Manner.”

A Writ of Error, which was brought by the Defendant *Miles*, upon a Judgment against him and the other Defendant *Cooper*, being quashed, because *Cooper* did not join in the Writ, a Question arose, what Costs the Defendant in Error ought to be allowed? It was holden; that he ought to be allowed the Costs of the Motion for quashing the Writ; and that he was besides intitled under the 4 *Ann. c. 16.* to the same Costs, as he should have had if the Judgment had been affirmed.

Ld. Raym.
1403.
Ginger v.
Cooper and
Miles.

A Writ of Error returnable before Judgment was quashed, and a Rule was made, that the Plaintiff in Error should pay Costs; it appearing, that he had made use of the Writ, after it was spun out by a Motion of his own in Arrest of Judgment: But the Court added; that if it had appeared, that the Defendant in Error had entered Continuances, to defeat the Writ of Error, they would have compelled him to pay Costs.

Str. 834. *Re-*
jindoz v.
Randolph.

After

Str. 139.
Gould v.
Coulthurst.

After a Writ of Error was brought, upon a Judgment of *Hilary* Term, the Plaintiff below entered Continuances upon the Judgment, until the following *Trinity* Term. It thereupon becoming necessary, for the Plaintiff in Error to quash his Writ, a Question arose, whether the Defendant in Error ought to have Costs? It was holden, that he ought not; and by the Court: As the Defect in the Writ of Error was occasioned by the Acts of the Defendant in Error, which the Plaintiff in Error could neither foresee or prevent, this is not a Case within the 4 *Ann. c. 16.* by which Costs are given against a Plaintiff in Error, upon quashing a defective Writ of Error. Another Question was, whether the Plaintiff in Error, being defeated of the Benefit of his Writ of Error by the Artifices of the Defendant in Error, ought to have Costs? The Court being equally divided as to this Question, a Rule was made for quashing the Writ of Error, without Costs of either Side.

1 Barn. 177.
Arden v.
Lamley.

The Plaintiff's Attorney delayed signing Judgment, until a Writ of Error, which

which had been sued out, was spent ; and then brought an Action of Debt upon the Judgment. A Rule was made absolute, for staying the Proceedings in the Action upon the Judgment ; and it was made Part of the Rule, that a new Writ of Error should be brought at the Expence of the Plaintiff's Attorney.

Upon a Rule to shew Cause, why the Costs of a Writ of Error should not be paid by the Plaintiff in the original Action, it appeared ; that he had obtained a Verdict, and taxed Costs ; that Judgment was signed, but not entered upon the Roll ; that after the Writ of Error was sued out, the Plaintiff entered a *Remittitur* as to Part of the Damages ; it being apprehended, that the Writ of Error was sued out on Account of an Excess of Damages. The Rule was discharged ; and by the Court : The Plaintiff had a Right to enter a *Remittitur* as to Part of the Damages, at any Time before Judgment was entered upon the Roll ; and consequently, the bringing of the Writ of Error was premature.

MS. Rep.
Cooper v.
Robins, Trin.
13 G. 3. in
K. B.

No

No Provision is made, by any of the Statutes which have been mentioned, for the Costs of a Writ of Error, brought by the Plaintiff or Demandant, upon a Judgment in the original Action for the Defendant or Tenant.

But by the 8 & 9 *W. 3. c. 11.* it is enacted : “ That if, after Judgment
 “ given for the Defendant in any Ac-
 “ tion, the Plaintiff or Demandant shall
 “ sue any Writ of Error, to annul the
 “ said Judgment, and the said Judg-
 “ ment shall be afterwards affirmed, or
 “ the said Writ of Error shall be dis-
 “ continued, or the Plaintiff shall be
 “ nonsuit therein, the Defendant or Te-
 “ nant, in every such Writ of Error,
 “ shall have Judgment to recover his
 “ Costs, against every such Plaintiff or
 “ Demandant, and have Execution for
 “ the same by *Capias ad Satisfaciendum*,
 “ *Fieri facias*, or *Elegit*.”

Str. 617.
 Wyvil v.
 Stapleton.

A Writ of Error being brought, upon a Judgment for the Defendant in the original Action, and the Judgment being reversed, the Question was, whe-
 ther

whether the Plaintiff in Error ought to have the Costs of the Suit upon the Writ of Error, as well as those of the original Action? It was holden; that he ought to have only the Costs of the original Action; and by the Court: The 3 *H. 7. c. 10.* and the 8 & 9 *W. 3. c. 11.* do only extend to the Case of an Affirmance of a Judgment. It would be unreasonable, if either of those Statutes did extend to the Case of a Reversal of a Judgment; in as much as, it would be very hard, that any Party should pay the Costs, occasioned by an Error in the Judgment of the Court below. This Court must now give such Judgment, as the Court below ought to have given; namely, Judgment for the Plaintiff in the original Action; and consequently, as he is not entitled to the Costs of the Writ of Error, under the 3 *H. 7. c. 10.* or the 8 & 9 *W. 3. c. 11.* he will only have the Costs of the original Action.

C H A P. XXXV.

Of Costs, where there is Judgment, or a Verdict, as to Part for the Plaintiff.

1 Lev. 63.
Porter v.
Harris and
another.

IN an Action of Covenant against two Persons, there was Judgment by Default against one of them : But there was a Verdict for the other, who had pleaded Performance of the Covenant, the Breach whereof was assigned. A Question arising concerning Costs ; it was holden ; that the Defendant who had pleaded should have Costs ; and that the Plaintiff should have neither Damages nor Costs as to the other Defendant : In as much as, it appears from the Verdict, which finds the Covenant to have been performed, that the Plaintiff had no Right of Action.

Ca. Pr in
C. B 107.
Langdon v.
Vinnicombe
and another.

An Action of *Assumpsit* being brought against two Persons, one of them let
Judg-

Judgment go by Default ; the other pleaded *non Assumpsit*, and the Issue thereupon joined was found for him. A Question arising concerning Costs ? It was holden ; that, as the Plea of *non Assumpsit* went to the Whole of the Plaintiff's Declaration, he was not entitled to any Costs on Account of the Judgment by Default : And that the Defendant, for whom there was a Verdict, was intitled to Costs.

To one Count in the Declaration the Defendant demurred, and there was Judgment for him upon the Demurrer ; to the other Count he pleaded, and upon the Trial of an Issue joined on the Plea, there was a Verdict for the Plaintiff. A Question arising concerning Costs ? It was holden ; that, as there was a Verdict for Plaintiff, he was entitled to Costs upon one Count, and that the Defendant was not entitled to any Costs, on Account of the Judgment upon the Demurrer.

MS. Rep.
Aftley v.
Young,
Trin. 1 G. 3.
in K. B.

It is the Practice of the Court of Common Pleas, to allow the Plaintiff

Costs as to all the Issues, if any one be found for him, although one or more of the Issues are found for the Defendant.

Tempest v.
Medcalf,
1 Will. 331.

Three feigned Issues being ordered to be tried, there was a Verdict for the Defendant upon the most material Issue; and a Verdict for the Plaintiff upon the other two. A Question arising, whether the Plaintiff ought to have any Costs? It was holden; that he ought to have the Costs of all the Issues; and by the Court: If any one Issue be found for the Plaintiff, he is entitled to Costs as to all the Issues.

But it is not the Practice of the Court of King's Bench, to allow the Plaintiff Costs as to any Issue, which is found for the Defendant.

MS. Rep.
Henderfon v.
Rumbold,
Hil. 4 G. 3.
in K. B.

A Rule to shew Cause, why some Counts should not be stricken out of the Declaration, was discharged; and by Lord *Mansfield* Ch. J. it is not necessary, to make such a Rule absolute; in as much as, the Issues, upon those Counts,

Counts as to which Evidence sufficient to entitle the Plaintiff to recover is not given, ought to be found for the Defendant: And the Master informs us; that he does never allow the Plaintiff Costs, as to those Counts, the Issues upon which are found for the Defendant.

C H A P. XXXVI.

In what Cases, one or more of the Defendants, for whom there is a Verdict, are entitled to Costs.

Str. 1066.
Dibben v.
Cook and
others.

BEFORE the Statute of the 8 & 9 *W. 3. c. 11.* if two or more Persons were Defendants in an Action, and the Plaintiff obtained a Verdict against one of them, the other or others were not entitled to any Costs, notwithstanding there was a Verdict for such other or others; the Construction of all the former Statutes, by which Costs are given to a Defendant, having been; that they only give Costs, where there is a Verdict for all the Defendants in an Action.

By the 8 & 9 *W. 3. c. 11.* it is enacted: “ That where several Persons
“ shall be made Defendants, in any
“ Action or Plaint of Trespass, Assault,
“ false Imprisonment or *Ejectione fir-*
“ *mæ,*

“ *mæ*, and any one or more of them
 “ shall be, upon the Trial thereof, ac-
 “ quitted by Verdict, every Person so
 “ acquitted shall recover his Costs, in
 “ like Manner as if the Verdict had been
 “ given against the Plaintiff or Plain-
 “ tiffs, and acquitted all the Defend-
 “ ants ; unless the Judge, before whom
 “ such Cause shall be tried, shall, im-
 “ mediately after the Trial thereof, in
 “ open Court certify upon the Record
 “ under his Hand, that there was a
 “ reasonable Cause for making such
 “ Person a Defendant.”

It has been holden ; that 8 & 9 Str. 1006.
W. 3. c. 11. does not extend to an Ac- Dikken v.
 tion of Trespas upon the Case ; and Cook and
 by the Court : The Word Trespas, others.
 therein contained, does only mean Tref-
 pas *vi et Armis*.

It has been likewise holden ; that this 2^d Barn. 118.
 Statute does not extend to an Action of Loman v. The
 Trover. Bishop of
 London.

In an Action of Replevin against two MS. Rep.
 Persons, there was a Verdict for one Ingle v.
 P 4 of Wordsworth
 and others
 Trin. 1 G. 3.
 in K. B.

of them; and the Judge had not certified, that there was a reasonable Cause for making him a Defendant. A Question arising, whether this Defendant was entitled to Costs under the 8 & 9 W. 3. c. 11. ? It was holden, that he was not; and by Lord *Mansfield* Ch. J. in the Case of *Dibben v. Cooke*, *Str.* 1006. it is laid down; that the Word *Trespass* in that Statute does only mean *Trespass vi et Armis*. It has been likewise holden, in a Case reported 2 *Roll. Rep.* 434. that an Action of *Replevin* is not within the Meaning of the 27 *Eliz.* c. 8. by which a Writ of Error in the Exchequer-Chamber is given, upon a Judgment of the Court of King's-Bench in an Action of *Trespass*. However agreeable, therefore, it may be to natural Justice, that the Defendant in the present Case should have Costs, as this Matter is settled by Determinations, the Court ought not to depart from those Determinations.

2 Barn, 103.
Jenkinson v.
Hoole and
Others.

In an Action of Ejectment, against *Hoole* and three Others, the Plaintiff obtained a Verdict against all the Defendants

endants except *Hoole*; and there was no Certificate, of a reasonable Cause for making him a Defendant. The Costs of *Hoole* being taxed at no more than three Pounds, he obtained a Rule to shew Cause, why he should not be allowed a third Part of a Defendants common Costs, and all his extraordinary Costs. The Rule was afterwards discharged with Costs; it appearing to be a Contrivance, to charge the Plaintiff with the extraordinary Costs, which had been incurred on Account of the other Defendants as well as *Hoole*; and that *Hoole* was indemnified by one of the Defendants, to whom he was Tenant.

In an Action of Trespass *vi et Armis* against four Persons, the Plaintiff obtained a Verdict against one of them: But the other three were found not guilty; and there was no Certificate, of a reasonable Cause for making them Defendants. Upon an Affidavit, that the Plaintiff was a poor travelling Jew, these Defendants obtained a Rule to shew Cause, why the Costs, to which they were entitled, should not be deducted,

2 Barn. Sup.
11. Mordecai
v. Nutting
and others.

ducted, out of what was due to the Plaintiff for Damages and Costs from the other Defendant. The Rule was afterwards discharged; and by the Court: The present Application is quite unprecedented.

2 Barn. 122.
Yales v. Gun.

An Issue being joined, and there being likewise a Joinder in Demurrer, the Plaintiff proceeded to Trial of the Issue, and obtained a Verdict. The Demurrer was afterwards argued, and Judgment was given for the Defendant. A Question arising concerning Costs, the Court of Common Pleas ordered the Prothonotary, to tax the Costs of the Trial for the Plaintiff, and the Costs of the Demurrer for the Defendant; and that the taxed Costs, which amounted to the lesser Sum, should be deducted out of those which amounted to the greater.

C H A P. XXXVII.

Of Costs, where Leave is given to
plead several Matters.

BY the 4 *Ann. c. 16. par. 4.* it is
enacted: “ That it shall be lawful
“ for any Defendant or Tenant in any
“ Action or Suit, or for any Plaintiff in
“ Replevin, in any Court of Record,
“ with Leave of the Court to plead as
“ many several Matters thereto, as he
“ shall think necessary for his Defence.”

By *par. 5.* it is provided: “ That if
“ any such Matter shall upon Demurrer
“ joined be judged insufficient, Costs
“ shall be given at the Discretion of
“ the Court; or if a Verdict shall be
“ found upon any Issue in the said Cause
“ for the Plaintiff or Demandant, Costs
“ shall be given in like Manner; unless
“ the Judge, who tried the said Issue,
“ shall certify; that the said Defendant
“ or

“ or Tenant, or Plaintiff in Replevin,
 “ had a probable Cause to plead such
 “ Matter, which upon the said Issue
 “ shall be found against him.”

2 Barn. 112.
 Greenhow v.
 Miley.

In an Action of Trespass *vi et Armis*, the Defendant, with Leave of the Court, pleaded Not Guilty and two special Pleas. To the latter Pleas the Plaintiff demurred; and there was Judgment for him upon the Demurrer: But upon the Trial of the Issue, joined upon the Plea of Not Guilty, he was nonsuited. A Question arising concerning Costs, the Court of Common Pleas, after consulting with the Judges of the other Courts, amongst whom there was a Difference of Opinion, ordered the Prothonotary, to tax the Costs of the Demurrer for the Plaintiff, pursuant to the 4 *Ann. c. 16.* and that so much, as should be allowed upon that Taxation, should be deducted out of the Costs taxed for the Defendant on Account of the Nonsuit.

In an Action upon the Case, for criminal Conversation with the Plaintiff's
 } Wife,

Wife, the Defendant, with Leave of the Court, pleaded Not Guilty, and not guilty within six Years. On the former Plea Issue was joined; to the latter there was a Demurrer. Upon the Trial of the Issue a Verdict was found for the Plaintiff, with fifty Pounds Damages. Upon the Demurrer, which was afterwards argued, Judgment was given for the Defendant. A Question arising concerning Costs, the Court of King's Bench ordered; that the Defendant should have the Costs of the Demurrer; and that neither Party should have the Costs of the Trial; and by Lord *Mansfield* Ch. J. We are of Opinion; that the particular Circumstances of this Case are sufficient to warrant our determining it, without going into the general Question, which might require a good deal of Consideration. The Defendant ought to have the Costs of the Demurrer; it appearing from the Judgment thereupon, that the Plaintiff had no Right of Action. The Plaintiff ought not to have the Costs of the Trial; because, as the Demurrer went to the Right of Action, he acted improperly, in

MS. Rep.
Cook v.
Sayer. Hil.
32 G. 2. in
K. B.

in proceeding to the Trial of the Issue, before Judgment was given upon the Demurrer. It would moreover be unreasonable; that the Plaintiff, who, as it now appears, had no Right of Action, should, notwithstanding there is a Verdict for him, be suffered to recover Damages; and unless he be suffered to do this, he cannot be entitled to the Costs of the Trial. On the other Hand, it is not reasonable; that the Defendant should have the Costs of the Trial of an Issue, which has been found against him.

2 Barn. Sup.
13. Bright v.
Jackson. Hil.
28 G. 2.

In an Action of Replevin, the Plaintiff, with Leave of the Court, pleaded two Matters in Bar of the Defendants Avowry. Issue being joined upon both Pleas, one of the Issues was found for the Plaintiff, the other for the Defendant. As the Judge, before whom the Cause was tried, did not certify; that the Plaintiff had a probable Cause to plead the Matter, the Issue upon which was found for the Defendant, a Question arose, whether the Defendant ought to have the Costs of that Issue? It was holden that he ought; and by the

the Court : As an Avowant is in the Nature of a Defendant, he is within the Meaning of the 4 *Ann. c. 16.*

There seems to be a Mistake in this Report, which says, that an Avowant is within the Meaning of the 4 *Ann. c. 16.* because he is in the Nature of a Defendant ; it not being the Intention of that Statute, to give Costs in any Case to a Defendant, who has pleaded several Matters. The Provision as to Costs, in *par. 5.* of that Statute, is not penned in very clear Terms : But the Intention thereof appears to be ; that if two Matters are pleaded, and one of the Issues joined upon these be found for the Plaintiff, he shall have the Costs not only of that Issue, but also of the other Issue, notwithstanding this is found for the Defendant ; unless the Judge, before whom the Cause was tried, shall certify ; that the Defendant had a probable Cause to plead the Matter, upon which the Issue found for the Defendant was joined. If this be the Intention of the 4 *Ann. c. 16.* the Consequence is ; that a Defendant, who has pleaded
I several

several Matters, shall, in case he obtain a Certificate, be exempted from the Costs of an Issue, which has been found for him : But he is not in any Case entitled to the Costs of such Issue. Upon the whole, it is not probable ; that the Judgment of the Court of Common Pleas was in this Case founded upon an Opinion, that an Avowant is in the Nature of a Defendant. It is on the contrary extremely probable ; that the Judgment of that Court was founded upon an Opinion, that, although the Word Avowant is not contained in the 4 *Ann. c. 16.* an Avowant in an Action of Replevin is equally within the Meaning of that Statute, as a Plaintiff in any other Action. There is scarce Room for Doubt, that the Word Avowant was omitted in that Statute by Accident ; a Certificate being thereby made as necessary, to exempt a Plaintiff in an Action of Replevin from Costs, as it is to exempt a Defendant in any other Action therefrom ; and consequently it must be intended ; that an Avowant in an Action of Replevin should have the same Right to Costs, as is thereby given to a Plaintiff in any other Action.

It

It may moreover be fairly inferred, from another Case; that an Avowant in an Action of Replevin is equally within the Meaning of the 4 *Ann. c. 16.* as a Plaintiff in any other Action. Four Issues being joined, upon four Pleas to an Avowry in an Action of Replevin, three of them were found for the Plaintiff; the fourth for the Avowant. The Judge, before whom the Cause was tried, not having certified, that the Plaintiff had a probable Cause to plead the fourth Plea, the Avowant obtained a Rule, for the Plaintiff to shew Cause, why he should not pay Costs as to the fourth Plea. As the Judge did after the obtaining of the Rule certify, that the Plaintiff had a probable Cause to plead the fourth Plea, it was discharged: But the Plaintiff was ordered, to pay the Avowant his Costs of the Application.

2 Barn. 121.
 Cremer v.
 Dent. East.
 24 G. 2.

If the Opinion of the Court had not been, that an Avowant in an Action of Replevin is equally within the Meaning of the 4 *Ann. c. 16.* as a Plaintiff in any other Action, they would not in this

Q

Case

Cause have granted a Rule to shew Cause; nor would they, upon discharging the Rule, have ordered the Plaintiff, to pay the Avowant his Costs of the Application.

Sayer 260.
Howard v.
Cheshire.

Upon a Rule to shew Cause, why the Plaintiff should not have the Costs of a Plea of Justification, it appeared; that the Defendant in an Action of Trespass had, with Leave of the Court, pleaded Not Guilty and a Justification; that Issues were joined upon both Pleas; that a general Verdict was found for the Plaintiff, with one Penny Damages; and that the Judge, who had not certified, that the Defendant had a probable Cause to plead the Matter pleaded in Justification, had certified upon the 43 *Eliz. c. 6.* A Question arising, whether the Plaintiff ought to have the Costs of the Plea of Justification? It was holden, that he ought not; and by *Dennison J.* (*Ryder Ch. J.* being absent) it has been said; that, as the Issue joined upon the Plea of Justification is found for the Plaintiff, and the Judge has not certified, that the Defendant
had

had a probable Cause to plead the Matter therein pleaded, the Plaintiff is entitled, under the 4 *Ann. c. 16.* to the Costs of that Plea: But the Words of that Statute are, “ that Costs shall,” in such Case, “ be given at the Discretion of the Court ;” and it has been resolved, at a Meeting of the Judges, that if there be a Certificate upon the 43 *Eliz. c. 6.* the Plaintiff shall not have the Costs of any Plea pleaded with Leave of the Court; although the Issue thereupon joined be found for him; and the Judge have not certified, that the Defendant had a probable Cause to plead the Matter therein pleaded.

As it is not required by the 4 *Ann. c. 16.* that a Certificate upon that Statute should be granted at the Trial of the Cause, a Certificate thereupon may be granted at a subsequent Time.

2 Barn. 121.
Cremer v.
Dent.

C H A P. XXXVIII.

Of double and treble Costs.

IF double or treble Damages are given by a Statute, in a Case wherein single Damages were recoverable at the Common Law, the Plaintiff may recover double or treble Costs, as well as such double or treble Damages, although the Statute be silent as to Costs.

2 Inst. 289.

The 8 *H. 6. c. 9.* whereby treble Damages are given in the Case of a forcible Entry, is silent as to Costs; yet treble Costs are recoverable in an Action upon that Statute; because single Damages were recoverable at the Common Law in an Action for a forcible Entry.

Dyer 159.
Pointel v.
Reynolds.

In an Action upon the 2 *H. 4. c. 1.* by which double Damages are given, to the Person who has been sued in a Court of Admiralty for a Thing done upon

upon Land, the Plaintiff, although that Statute be silent as to Costs, may recover double Costs in an Action thereupon : For no Court of Admiralty has Jurisdiction in any Thing done upon Land, and an Action upon the Case did always lie at the Common Law, for suing in a Court which had not Jurisdiction.

By the 2 & 3 W. & M. c. 5. *treble Damages and Costs* are given, in an Action upon the Case for a Rescue. A Question arising, whether, as that Statute does not expressly say *treble Costs*, the Plaintiff in an Action thereupon ought to have more than single Costs ? It was holden, that he ought to have treble Costs ; and by the Court : This Case is within the Reason of the Cases, wherein it has been holden ; that if treble Damages are given by a Statute, in a Case in which single were recoverable at the Common Law, the Plaintiff in an Action upon the Statute, may recover treble Costs ; and if there were not such Cases, the true Construction of the 2 & 3 W. & M. c. 5. would be, that

Carth. 321.
Lawson v.
Story. Skin.
555. S. C.
Ld. Raym.
19 S. C.

Q₃

the

the Word *treble*, therein contained, does equally relate to the Word *Costs*, as to the Word *Damages*.

2 Inst. 289.
Moor 915.
Hardr. 152.

But if a Statute give double or treble Damages, in a Case wherein Damages were not recoverable at the Common Law, the Plaintiff in an Action upon the Statute, cannot recover Costs; for, as the Statute of *Gloucester* does only give Costs, in Cases wherein Damages were recoverable at the Common Law, or are given by *par.* 1. of the first Chapter thereof, it can never operate, so as to add Costs to the Damages given by a subsequent Statute; and consequently, the Plaintiff, in an Action upon the subsequent Statute, can only recover the Damages thereby given.

Dyer 177.
2 Inst. 289.

The 1 & 2 *Pb. & M. c.* 12. makes the Person, who drives a Distress out of the Hundred, liable to the Penalty of five Pounds, and treble Damages: But Costs are not recoverable in an Action upon that Statute; because an Action did not lie at the Common Law, for driving a Distress out of the Hundred.

Some

Some Cafes, in which double or treble Costs are given by particular Statutes, have already been mentioned; as in an Action of Replevin; in an Action of Waste; in an Action of Debt, for not setting forth Tithes; in an Action against an Officer, on Account of something done by virtue of his Office; in a Suit upon a Writ of Prohibition; and in a Suit upon a Writ of Error. It is not necessary to repeat any of these; nor is it necessary, to mention many other Cafes, wherein double or treble Costs may be recovered, concerning which no Question has arisen.

In an Action, brought against a Person discharged under a Statute for the Relief of insolvent Debtors, for a Debt due before his Discharge, the Defendant pleaded the Discharge in Bar of the Action, and obtained Judgment. Being thereupon entitled under the Statute to treble Costs, a Question arose, from what Time he ought to be allowed such Costs? It was holden; that he ought to be allowed them, from the Time of putting in his Plea.

2 Barn. 112.
Harper v.
Sherrard.

Q 4

It

1 Roll. Abr.

517.

Trelawney v.

Babbe. Hil.

16 Car. 1.

It is laid down in one Case ; that, although a Person be entitled to double or treble Costs, he is only entitled to have such Costs as are given by the Jury doubled or trebled, and not such as are given by the Court *de Incremento*.

Cro.Eliz 582.

Thorough-

good v.

Scroggs.

Mich. 38 El. 2 Leon. 52. Rolston v. Chambers. Mich. 29 Eliz.

But in two Cases, prior to this Case, a contrary Doctrine is laid down.

3 Lev. 351.

Sandv. Child.

Pasch. 5 W.

& M. Carth.

321. Lawfon.

v Story Trin.

6 W. & M.

And in two Cases subsequent thereto it is laid down ; that wherever a Person is entitled to double Costs, the Costs given by the Court *de Incremento*, are to be doubled, or trebled, as well as those given by the Jury.

Str. 1048.

Smith qui tam

v. Dunn.

Trin. 9 G. 2.

The Doctrine of the four Cases last mentioned is adhered to in a modern Case ; and the Authority of the Case of *Lawfon v. Story, Carth. 321*, is therein expressly recognized. The Plaintiff having obtained a Verdict against the Defendant, in an Action for suing in a Court of Admiralty, on Account of a Matter arising upon Land, in which Case double Damages are given by 2 H.

4. c. 11. A Question arose, whether the Costs given by the Court *de Incremento* ought to be doubled? It was holden, that they ought; and by the Court: The Costs *de Incremento* ought, in such Case, to be doubled, as well as those given by the Jury.

In an Action against a Constable, on Account of something done by virtue of his Office, a Verdict was found for him. There not being an Allowance of double Costs upon the *Postea*, a Question arose, whether the Defect of such Allowance could be cured by the Court? It was holden, that it could not; and by the Court: As the Words of the 7 *Ja. 1. c. 5.* are, "That the Justices, Justice, or other Judge, before whom the Matter shall be tried, shall, by virtue of this Act, allow the Defendant his double Costs," and such double Costs are not in the present Case allowed upon the *Postea*, the Court has no Power to allow them.

2 Ventr. 45.
Anon. Trin.
1 W. & M.

The Court being moved for the treble Costs, given by the 10 & 11 *W. 3. c. 10.* upon

Str. 50.
Rex v. Poland.
East. 3 G. 1.

upon an Affidavit of two Persons, that the Defendant, a disbanded Soldier, had been acquitted upon an Indictment for illegally exercising a Trade; the only Doubt was, whether such Costs should be ordered by a Rule of Court, founded upon the Affidavit? Or whether a Suggestion of the Facts sworn in the Affidavit should be entered upon the Roll, in order to entitle the Defendant to treble Costs? The Case of *Walker v. Eger-ton*, Hil. 7 W. 3. was cited; in which a Suggestion was entered upon the Roll, for the sake of entitling the Defendant, who was a Collector of the Land-Tax, to treble Costs, in these Words, “ because it appears to the Court upon
 “ Examination, that,” &c. The Case of *Bateman v. Wallis*, Trin. 9 W. 3. and the Case of *Brampton v. Crabb*, Hil. 3 G. 1. were likewise cited. Upon the Authority of these Cases, the Court, for the sake of entitling the Defendant to treble Costs, ordered a Suggestion to be entered upon the Roll, in these Words, “ because it appears to the
 “ Court upon the Oath of two credible
 “ Witnesses, that,” &c.

In

In an Action against a Commissioner of the Land-Tax, the Plaintiff was nonsuited. As the Judge, before whom the Cause was tried, had not allowed treble Costs, a Question arose, whether the Defendant ought to have treble Costs? A Rule was made for treble Costs; and the Court ordered an Entry to be made upon the Roll, in these Words, “ because it appears to the Court upon Examination, that the Defendant was a Commissioner, and in the Execution of his Office as a Commissioner, pursuant to an Act of Parliament.”

Ca. Pr. in
C. B. Hunt
v. Robinson.
Trin. 5 G. 1.

The Plaintiff having moved for Leave to discontinue upon Payment of Costs, the Defendant, upon an Affidavit of his being a Justice of the Peace, and that the Action was brought against him on Account of something done by virtue of his Office, moved for double Costs. It was hereupon made Part of the Rule for Leave to discontinue, that the Defendant should have double Costs; and by the Court: After a Verdict in such Case, a Suggestion upon the Roll is necessary to entitle the Defendant to double

Str. 974.
Devenish v.
Mertins, East.
7 G. 2.

ble Costs : But where Leave is given to discontinue, the Court may make it Part of the Rule for giving Leave to discontinue, that the Defendant shall have double Costs.

Barton and
Others v.
Miles and O-
thers. Rep.
Temp.
Hardw. 126.
Trin. 8 G. 2.

Upon a Rule to shew Cause, why a Suggestion should not be entered upon the Roll, in order to entitle the Defendants to double Costs, it appeared ; that the Defendants were Collectors of the Tax for Window Lights ; that the Action, which was an Action of *Trover*, was brought against them for the taking of Goods by virtue of their Office ; and that there was a Nonsuit, for want of the Plaintiffs proving a Property in the Goods. The Rule was made absolute ; and by Lord *Hardwicke* Ch. J. in a late Case of the same Kind, wherein there was a Discontinuance, a Rule of Court was made for double Costs : But there being in the present Case a Nonsuit, Judgment must be entered upon the Roll, and a Suggestion must be afterwards entered thereupon. As the Plaintiffs were nonsuited for want of proving Property in the Goods, it could not appear to the Judge

Judge, before whom the Cause was tried; that the Defendants were Officers; and that the Action was brought against them, on Account of something done by virtue of their Office; and consequently, as there was no Opportunity for the Judge to allow double Costs upon the *Postea*, the Defendants have no other way of coming at double Costs, than by entering a Suggestion upon the Roll.

C H A P. XXXIX.

In what Cases, the Court will make a Rule for staying the Proceedings in a second Action, until the Costs of a former Action shall be paid.

Ld. Raym.
697.
1 Barn. 101.

IF a second Action of Ejectment be brought, upon the same Demise on which a former Action was brought, the Court will make a Rule for staying the Proceedings in the latter Action, until the Costs of the former shall be paid.

4 Mod. 379.
Roberts v.
Cook.

And the Court will as well do this, where there was a Nonsuit in the former Action, as if the Merits had been therein tried.

2 Barn. 107.
Hattersley v.
Jackson.

And the Court will as well do this, where the second Action is brought in a different Court, as if it had been brought

brought in the Court, wherein the former Action was brought.

A Rule was made for staying the Proceedings in a second Action of Ejectment, until the Costs of a Judgment of *Nonpross*, in a former Action upon the same Demise, shall be paid.

Pr. Reg. 174.
Pendock v.
Johnson.

The Lessors of the Plaintiff had before delivered three Declarations, in Actions of Ejectment, in the Court of Common Pleas; and two, in Actions of Ejectment, in the Court of King's Bench, for the same Premises; and, after giving Notices of Trial in the five Actions, had countermanded all the Notices Time enough to save Costs. The Court being moved, to stay the Proceedings, until the Costs in all the other Actions shall be paid, no Rule was made; and by the Court: A Defendant is not in such Case entitled to Costs.

Sir 1099.
Thrustout on
the Demise of
Parker and
Wife v.
Troublesome.

Upon a Rule to shew Cause, why the Proceedings should not be stayed, until the Costs in two other Actions of Ejectment shall be paid, it appeared; that

MS. Rep.
Doe on the
Demise of
Ginger v.
Barnardiston,
East. 13 G. 3.
in C. B.

in one Action of Ejectment, upon the same Demise, the Defendant in the present Action was by a Rule of Court made a Defendant ; that a special Jury, at the striking of which the Attorney for the Lessor of the Plaintiff attended, was stricken ; and that no further Proceedings were had in that Action : That in a second Action of Ejectment, upon the same Demise, the Defendant in the present Action was by Rule of Court made a Defendant ; that a special Jury, at the striking of which the Attorney for the Plaintiff attended, was stricken ; and that no further Proceedings were had in that Action. The Rule was made absolute ; and by the Court : Greater Power has always been exercised by Courts over Actions of Ejectment, than over other Actions. It does not appear ; that a Rule like that now applied for has ever been made : But it is highly reasonable, that such a Rule should, for the sake of preventing Vexation, be made in the present Case ; and we have Reason to believe, that the other Courts will, for the Time to come, make such Rules in Cases like the present.

A second

A second Action of Ejectment being brought, upon the same Demise, by the Lessor of the Plaintiff in a former Action, who was in Custody, under an Attachment for the Non-payment of the Costs of the former Action, the Court was moved ; to stay the Proceedings, until the Costs of the former Action shall be paid. No Rule was made ; and by the Court : As the Lessor of the Plaintiff is in Custody, under an Attachment for Non-payment of the Costs of the former Action, there is no Reason for the Court to make the Rule now applied for ; such an Attachment being in the Nature of a *Capias ad Satisfaciendum*.

1 Barn. 127.
Benn on the
Demise of
Mortimer v.
Denn.

If the Defendant, against whom there has been a Verdict in an Action of Ejectment, bring an Action of Ejectment against the Plaintiff in the former Action for the same Premises, the Court will not make a Rule, for staying the Proceedings until the Costs of the former Action shall be paid.

4 Mod. 379.
Roberts v.
Cook.

If the Defendant, after bringing a Writ of Error upon a Judgment against
R him

Salk. 259.
Fenwick v.
Groveknor.

him in an Action of Ejectment, bring an Action of Ejectment for the same Premises, the Court will not make a Rule, for staying the Proceedings upon the Writ of Error, until the Costs of the first Action of Ejectment shall be paid : But the Court will in such Case make a Rule, for staying the Proceedings in the second Action of Ejectment, until the Writ of Error shall be determined.

1 Barn. 100.
Lazarus v.
Pritchard
Hil. 11 G. 2.

It is in one Case said ; that a Rule to shew Cause, why the Proceedings in an Action of Trover should not be stayed, until the Costs taxed for the Defendant in a former Action for the same Cause shall be paid, was discharged as unprecedented ; and by the Court : Such a Rule is never granted, except in an Action of Ejectment.

Str. 1206.
Real v.
Macky.
Eaft. 17 G. 2.

It is in another Case said ; that the Court does make a Rule, for staying the Proceedings in a second Action of Ejectment, until the Costs of a former Action shall be paid ; because an Action of Ejectment is more under the Power
of

of the Court than any other Action :
But that the Court ought not to make
such a Rule in any other Action.

The Doctrine of the two Cases last
mentioned is not reconcilable, with
what may be fairly inferred from some
older Cases.

After Lord *Byron* had been nonsuited
in one Action, and five Pounds Costs
were taxed against him, he refused to
pay the Costs, and brought another Ac-
tion for the same Cause. It was said ;
that, as he could not be compelled, it
being Parliament Time, to pay the Costs
of the former Action, the present Ac-
tion was brought merely for Vexation.
A Rule was made to shew Cause, why
the Proceedings should not be stayed,
until the Costs in the former Action
shall be paid.

1 Vent. 100.
Lord Byron's
Case. Mich.
22 Car. 2.

A Verdict having been found for the
Plaintiff in an Action of Ejectment, the
Defendant in that Action brought an-
other Action of Ejectment, against the
Plaintiff in the former Action, for the

4 Mod. 379.
Roberts v.
Cook.
Hil. 6 W. 3.

same Premises. The Court being moved, to stay the Proceedings until the Costs in the former Action shall be paid, no Rule was made ; and by the Court : There is in this Case no Vexation, as the Verdict in the former Action was for the Plaintiff : But if it had been against him, or if he had been nonsuited, he should not have brought another Action, before the Costs of the first Action had been paid, because that would have been vexatious.

Ld. Raym.
697. Bafs v.
Firmen. Mich.
13 W. 3.

In an Action of Debt upon a Bond, the Plaintiff declared for a certain Sum in *English* Money. At the Trial of the Cause it appeared ; that the Bond was for the Payment of the Sum declared for in *West Jersey* Money. Holt Ch. J. before whom the Cause was tried, being of Opinion that this Variance was fatal, the Plaintiff was nonsuited. He afterwards brought another Action of Debt upon the same Bond ; in which he declared for certain foreign Coin of a certain Value in *English* Coin. Hereupon the Court was moved ; that the Proceedings in this Action might be stayed,

stayed, until the Costs of the former shall be paid. The Court refused to make a Rule ; because the Merits did not come in Question at the Trial of the former Action ; the Nonsuit being upon a Variance.

It may moreover be inferred, from two very late Cases ; that, if any second Action appear, upon all the Circumstances of the Case, to be vexatious, the Court will make a Rule, for staying the Proceedings, until the Costs of the former Action shall be paid.

Upon a Rule to shew Cause, why the Proceedings in an Action of *Assumpsit* should not be stayed, until the Costs in an Action of *Trover* shall be paid, it appeared ; that, after a Commission of Bankruptcy had been issued against the Plaintiff, he petitioned that the Commission might be superseded, or that an Issue might be ordered, to try whether the Debt of the petitioning Creditor did amount to a Hundred Pounds ; that the Petition was, upon reading the Affidavits and hearing Council on both

MS Rep.
Gravenor v.
Cape and an-
other, East.
9 G. 3.
in C. B.

Sides, dismissed by Lord *Camden* Chancellor ; that the Plaintiff afterwards brought an Action of *Trover*, against the present Defendants, for the Conversion of Goods assigned to them under the Commission ; that a Verdict was found for the Defendants in that Action ; that the Verdict in that Action, which was found in *Hilary* Term 1768, was acquiesced under ; that the Defendants have collected and divided the Effects of the Plaintiff ; and that the present Action is brought for Money had and received by the Defendants to the Use of the Plaintiff. The Rule was made absolute ; and by *Wilmot* Ch. J. it has not been usual, for the Court to make a Rule, to stay the Proceedings in a second Action, until the Costs of a former Action shall be paid, unless in an Action of Ejectment : But, upon the particular Circumstances of a Case, the Court may make such Rule in any other Action ; and we are of Opinion, that the present is a proper Case to make such Rule in. It has been said ; that the Plaintiff can now prove something, which

which was not proved in the Action of *Trover*, and which will reduce the Debt of the petitioning Creditor to a lesser Sum than a Hundred Pounds : But, as the *quantum* of the petitioning Creditors Debt was decided upon by Lord *Camden* ; and must have been proved in the Action of *Trover*, the present Action is quite vexatious. It might moreover be of dangerous Consequence, to give the Plaintiff a Chance, of making void all the Proceedings under the Commission, which have been so long acquiesced under. One of the Reasons, for making such Rule as is now applied for, in a second Action of Ejectment, is ; that a Verdict, in one Action of Ejectment, cannot be pleaded in Bar of another Action for the same Premises. This Reason holds in the present Case ; in as much as, the Verdict in the Action of *Trover* cannot be pleaded in Bar of the present Action.

Upon a Rule to shew Cause, why the Proceedings in an Action of *Assumpsit* should not be stayed, until the Costs of
R 4 a Non-

MS. Rep.
Melchar and
Others v. The
Executors of
Halsey, Hil.
11 G. 3. in
C. B.

a Nonfuit in a former Action of *Assump-
sit* shall be paid, it appeared; that the
Action was brought for Money due
upon a Contract with *Halsey*, the De-
fendant's Testator, who was a Com-
missary in *Germany* during the late War;
that the Plaintiffs had not submitted
their Demand to be liquidated, by the
Commissioners appointed to liquidate
such Demands; that Lord *Mansfield*
being of Opinion, at the Trial of the
former Action, that the Action did not
lie, the Plaintiffs chose to be nonsuit-
ed; and that, upon a Motion for a new
Trial, the Justices of the Court of
King's Bench were all of Opinion; that
the Action did not lie. The Rule was
made absolute; and by *De Grey* Ch. J.
the Justice of the present Case does cer-
tainly require the Interposition of the
Court, in case the Court have Power to
interpose; and we are all of Opinion,
that the Court has such Power. It is
admitted; that the Court has Power,
to make such Rule as is now applied
for, in the Case of a second Action of
Ejectment; and there does not appear
to be any good Reason, for confining the
Power

Power of the Court to a second Action of Ejectment. In Lord *Byron's Case*, 1 *Vent.* 100. a Rule was made to shew Cause, why the Proceedings in a second Action, which was not an Action of Ejectment, should not be stayed, until the Costs of a Nonsuit in a former Action shall be paid; because the Defendant could not, by Reason of the Plaintiff's having Privilege of Parliament, compel the Payment of those Costs. From the making of a Rule to shew Cause in that Case, the Opinion of the Court appears to have been; that such Rule as is now applied for may, upon the particular Circumstances of a Case be made, although the Action be not an Action of Ejectment. In the Case of *Bass v. Firmen*, Lord *Raymond* 697. it is said; that the Court refused to make a Rule, for staying the Proceedings in a second Action upon a Bond, until the Costs of a Nonsuit in a former Action upon the same Bond shall be paid; because the Nonsuit was upon a Variance, and not upon the Merits. It may from that Case be inferred; that, if the Nonsuit had been
upon

upon the Merits, the Court would have made such Rule as is now applied for. In the Case of *Gravenor v. Cape and Another*, *East. 9 G. 3.* in this Court, a Rule was made, for staying the Proceedings in an Action of *Assumpsit*, until the Costs in an Action of *Trover* shall be paid; the Action of *Assumpsit* appearing to be vexatious. The present Action, of which the Merits were tried in the former Action, appears to be vexatious, and the more so; in as much as, it is not even now alledged, that the Plaintiffs can by any new Evidence make a better Case. It has been said; as an additional Circumstance for making the Rule absolute, that the Defendants have no way to compel the Payment of the Costs of the Nonsuit in the former Action, the Plaintiffs being Foreigners: But I pay no Regard to that Circumstance; my Opinion being founded solely upon the Vexatiousness of the Action. The other Justices concurred in Opinion with the Ch. J. that the Rule ought to be made absolute on Account of the Vexatiousness of the Action; and that no Regard ought to be paid

paid to the Circumstance of the Plaintiffs being Foreigners.

Upon a Rule to shew Cause, why the Proceedings in an Action upon the Statute against Usury should not be stayed, until the Costs of a former Action upon the same Statute shall be paid, it was alledged; that both Actions were brought for Usury in the same Transaction; and that, although the first Action was brought in the Name of another Person, it was in Fact brought by the Plaintiff in the present Action. The Rule was discharged; and by the Court: It has been said; that such a Rule was made in a late Case: But if it were, the Court was off its guard; for such Rules have in such Cases constantly been refused.

MS. Rep.
English qui
tam v. Cox.
Trin. 5 G. 3.
in K. B.

C H A P. XL.

Of deducting the Costs of one Action from those of another.

Stt. 1203.
Dutby v. Tito
and Others.
Hil. 17 G 2.

IN an Action, brought by *Dutby* against *Tito* and four others, there was a Verdict for the Defendants. In another Action, brought by *Tito* against *Dutby*, there was a Verdict for *Dutby*. *Tito* moved the Court, that the Costs and Damages, he was liable to in one Action, might be deducted from those he was entitled to in the other. No Rule was made; and by the Court: Such a Rule ought not to be made in this Case; in as much as, a Statute was necessary, to enable a Defendant in an Action, to set off a Debt due to him from the Plaintiff. How, moreover, can the Court give a Preference to *Tito*, who is but one of five Defendants, when *Dutby* has by Law a Right, to pay the whole Costs to which soever of the Defendants he pleases.

The

The Court of Common Pleas did, in another Case, discharge a Rule to shew Cause, why the Costs of one Action should not be deducted from those of another. But it is in this Case added by the Reporter; that in the Case of *Ford v. Miles, East.* 12 G. 2. a Rule was made by this Court, for deducting the Costs of one Action from those of another.

2 Barn. 102.
Clewlow v.
Lowe, Trin.
16 G. 2.

And in divers subsequent Cases, Rules have been made, by the Court of Common Pleas, for deducting the Costs of one Action from those of another.

The Plaintiff in this Action had obtained a Verdict, at the last Assize for the County of *Kent*. A Verdict having been obtained at the same Assize, in an Action of Ejectment, brought upon the Demise of the Defendant in this Action against the Plaintiff therein, a Rule was made absolute, by which the Defendant in this Action was impowered to deduct the Costs, to which he was intitled in the Action of Ejectment, from the Costs due to the Plaintiff in this Action.

2 Barn. 128.
Scoffin v.
Robinson.
East. 26 G. 2.

The

2 Barn. Sup.
12 Roberts v.
Biggs. Trin.
28 G. 2.

The Plaintiff in this Action had obtained a Verdict at the last Assize for the County of *Nottingham*. A Verdict having been obtained at the same Assize in an Action of Trespass, brought by the Defendant in this Action against the Plaintiff therein, a Rule was made absolute; by which the Defendant in this Action was impowered to deduct the Costs, to which he was intitled in the Action of Trespass, from the Costs due to the Plaintiff in this Action.

MS. Rep.
Roberts v.
Mackoul.
Trin. 9 G. 3.
in C. B.

Upon a Rule to shew Cause, why the Sum of thirteen Pounds thirteen Shillings, taxed for the Defendant for Costs, in a former Action brought by the Plaintiff against the Defendant and *J. S.* should not be deducted from the Sum of Money, taxed for the Plaintiff for Damages and Costs in the present Action; and why, on Payment of the Balance, Proceedings upon the Judgment in the present Action should not be stayed, it appeared; that the Plaintiff was insolvent; and that, if the Sum of thirteen Pounds thirteen Shillings should be deducted, his Attorney, who will at all

all Events lose the Sum of twelve Pounds, being the Difference between what was allowed for Costs, and what would be allowed for Costs, upon a Taxation, as between Attorney and Client, would likewise lose the Benefit of his Lien upon the thirteen Pounds thirteen Shillings; and that a Writ of Error, upon the Judgment in the present Action, was sued out. The Rule was made absolute; and by *Wilmot* Ch. J. the setting off of one Demand against another, which has not long been expressly allowed by our Law, was allowed by the *Roman* Law, and is agreeable to natural Justice. An Attorney has, as between himself and his Client, a Lien for his Fees and Disbursements upon the Damages and Costs recovered in an Action: But he, equally with his Client, is subject to the Rules of natural Justice; and consequently, the Costs, taxed for the Defendant in the former Action, may as well be deducted, from the Damages and Costs taxed for the Plaintiff in the present Action, as if the Plaintiff's Attorney had no Lien upon those Damages and Costs.

Upon

MS. Rep.
Thrustout on
the Demise of
Barnes v.
Crafter, Trin.
12 G. 3. in
C. B.

Upon a Rule to shew Cause, why the Sum of twelve Pounds five Shillings, taxed for the Defendant in the present Action, should not be deducted from the Sum of forty Pounds five Shillings, taxed for the Plaintiff for Damages and Costs in a former Action, it appeared; that the Plaintiff had, in *Hilary* Term last, signed Judgment for Damages and Costs to the Amount of forty Pounds five Shillings, in an Action for Rent; and that the Sum of twelve Pounds five Shillings had been since taxed for the Defendant, upon a Judgment as in the Case of a Nonsuit in the present Action. The Rule was made absolute; and by *De Grey* Ch. J. the Law seems to be settled, by divers Determinations since the Statutes of Set-off, that, what is intended to be done by virtue of the present Rule, ought in such Case to be done; and although no Case antecedent to those Statutes is to be found, in which such Rule as is now applied for was made, it is probable; that the Court might, by virtue of its discretionary Power, have made such Rule at the Common Law; the making thereof being perfectly agreeable to natural Justice.

C H A P.

C H A P. XLI.

Of Costs, where a Judgment of Outlawry is superseded or reversed.

BY a Rule of the Court of Common Pleas, of *Trin. 33 Car. 2.* it is ordered : “ That no Defendant, who
 “ shall be outlawed, and who shall
 “ appear and reverse the Outlawry, shall
 “ upon such Reversal pay for Costs to
 “ the Plaintiff any Sum exceeding the
 “ usual Costs of the Exigent in this
 “ Court, together with the Fine to our
 “ Lord the King upon the original
 “ Writ, if any was paid ; and that all
 “ further Costs shall be respited, until
 “ the Time of signing Judgment for
 “ the Plaintiff.”

It is by this Rule further ordered :
 “ That every Defendant so outlawed,
 “ and reversing such Outlawry, if the
 “ Plaintiff shall not proceed within two
 S “ Terms

“ Terms next after Notice of the Re-
 “ versal, shall have Costs to be taxed
 “ by the Prothonotary.”

By a Rule of the same Court of *Trin.*
 2 *Ja.* 2. it is ordered : “ That upon
 “ every Writ of Exigent, which shall
 “ be sued forth from this Court, if a
 “ *Supersedeas* be not put in thereunto
 “ at or before the Day of Appearance,
 “ no *Supersedeas* shall be allowed by any
 “ Sheriff to any such Writ ; until the
 “ Defendant shall have paid unto the
 “ Plaintiff or his Attorney, or left in
 “ Court with one of the Prothonotaries,
 “ the full Costs of the Suit.”

It is by this Rule further ordered :
 “ That before the Reversal of an Out-
 “ lawry, or a *Supersedeas* made there-
 “ unto, the Defendant shall pay to the
 “ Plaintiff or his Attorney, or leave in
 “ Court for him, the full Costs of the
 “ Suit to the Exigent.”

It is by this Rule further ordered :
 “ That if the Plaintiff hath, by virtue
 “ of an Outlawry, taken an Inquisition,
 “ and

“ and extended into the King’s Hands
“ the Goods, Chattels, Lands or Tene-
“ ments, of the outlawed Person, and
“ returned the same into the Exche-
“ quer, such further Costs shall be tax-
“ ed by the Prothonotary, and paid to
“ the Plaintiff or his Attorney, or left
“ in the Court for him, as he hath been
“ at in taking and prosecuting the said
“ Inquisition, before any Certificate of
“ such Reversal shall be made by the
“ Clerk of the Outlawries.”

By a Rule of the same Court of
Trin. i W. & M. it is ordered : “ That,
“ where any Outlawry shall be tran-
“ scribed into the Court of Exchequer,
“ and afterwards such Outlawry shall
“ be reversed, before any Judgment shall
“ be entered for removing the King’s
“ Hands, and the Party outlawed re-
“ stored to his Possession, the Prosecutor
“ of such Outlawry shall be paid such
“ Costs, as shall be taxed by his Ma-
“ jesty’s Remembrancer, or his Deputy,
“ for the Proceedings in this Court.”

1 Barn. 259.
Heely v.
Hewson.

It appearing ; that pending the Exigent, the Defendant was a Prisoner in *York Gaol*, the Court, upon the Defendant's entering a common Appearance, ordered a Judgment of Outlawry to be reversed without any Costs.

2 Barn. 260.
Farnworth v.
Smith.

Upon an Affidavit, that the Defendant was a public visible Man, and that the Plaintiff had not endeavoured to arrest him, a Rule was made to shew Cause, why a Judgment of Outlawry should not be reversed at the Expence of the Plaintiff. That Part of the Affidavit, which related to the Defendant's being a public visible Man, being fully answered ; and it being moreover sworn, that the Defendant did totally abscond, the Rule was discharged ; and by the Court : As the Defendant did totally abscond, no Endeavour to arrest him was necessary.

Pr. Reg. 270.
Manghen v.
Graham.

After several *Capias's utlegatum* had been sued out, and the Defendant had, after a great Expence to the Plaintiff, been arrested, a Judgment of Outlawry was reversed. A Question arising, what
Costs

Costs the Plaintiff ought to have? It was holden; that he ought only to have Costs to the Time of the Exigent; and that the subsequent Costs should abide the Event of the Cause: But it was said by the Court; that if the Judgment of Outlawry had been sent into the Court of Exchequer, and a Levy had been made, or a Lease granted, the Plaintiff would have been entitled to his whole Costs.

C H A P. XLII.

Of Costs, in an Indictment.

BY the 31 *Eliz. c. 11.* it is enacted:
“ That if the Person indicted of
“ forcible Entry, or of holding with
“ Force, hath had the Occupation, or
“ hath been in quiet Possession, by the
“ Space of three whole Years next be-
“ fore the Day of finding the said In-
“ dictment, and his Estate therein be
“ not ended, he may alledge this for
“ Stay of Restitution, and Restitution
“ to stay until that be tried, if the other
“ will traverse the same; and if the
“ Allegation be tried against the Person
“ indicted, then he to pay such Costs
“ and Damages, as shall be assessed by
“ the Judge or Justices, before whom
“ the same shall be tried, the same Costs
“ and Damages to be recovered and
“ levied, as is usual for Costs and Da-
“ mages contained in Judgments upon
“ other Actions.”

An

An Inquisition of forcible Entry, found before a Justice of the Peace, having been removed into the Court of King's Bench by a *Certiorari*, the Defendant, for Stay of Restitution, pleaded quiet Possession by the Space of three Years next before the Day of finding the Indictment. The Plea being traversed, and a Verdict being found for the Prosecutor, it was holden ; that he was entitled to Costs under the 31 *Eliz. c. 11.*

Ld. Raym.
1036.
Regina v.
Goodenough.

By the 5 & 6 *W. & M. c. 11. par. 2.* it is enacted : “ That all the Parties
“ indicted, prosecuting a *Certiorari*, for
“ removing an Indictment of Trespass
“ or Misdemeanor, before Trial had,
“ from a Court of General or Quarter
“ Sessions of the Peace into the Court
“ of King's Bench, shall, before the
“ Allowance thereof, find two sufficient
“ Manucaptors, who shall enter into a
“ Recognizance, before one or more
“ Justices of the Peace, of the County
“ or Place wherein such Indictment
“ has been found, in the Sum of twen-
“ ty Pounds, with Condition at the

“ Return of such Writ to appear, and
“ plead to the said Indictment in the
“ Court of King’s Bench ; and, at his
“ and their own Costs and Charges, to
“ cause and procure the Issue that shall
“ be joined upon the said Indictment,
“ or any Plea relating thereto, to be
“ tried at the next Assize, to be held
“ for the County wherein the said In-
“ dictment was found, after such *Cer-*
“ *tiorari* shall be returnable, if not in
“ the Cities of *London, Westminster*, or
“ County of *Middlesex*; and if in the
“ said Cities or County, then to cause
“ or procure it to be tried, the next
“ Term after such *Certiorari* shall be
“ granted, or at the Sitting after the
“ said Term, if the Court of King’s
“ Bench shall not appoint any other
“ Time for the Trial thereof; and if
“ any other Time shall be appointed
“ by the Court, then at such other
“ Time ; and to give due Notice of
“ such Trial to the Prosecutor, or his
“ Clerk in Court; and that the said
“ Recognizance shall be certified into
“ the Court of King’s Bench, with the
“ said *Certiorari* and Indictment, to be
“ there

“ there filed ; and the Name of the
“ Prosecutor, if he be the Party griev-
“ ed or injured, or some publick Of-
“ ficer, to be indorsed on the Back of
“ the said Indictment ; and if the Per-
“ son prosecuting such *Certiorari*, being
“ the Defendant, shall not, before Al-
“ lowance thereof, procure such Ma-
“ nufacturers to be bound in a Recog-
“ nizance as aforesaid, the Justices of
“ the Peace may and shall proceed to
“ Trial of the said Indictment, at the
“ said Sessions, notwithstanding such
“ Writ of *Certiorari* so delivered.”

By the same Statute, *par.* 3. it is en-
acted : “ That if the Defendant, pro-
“ secuting a *Certiorari*, for removing
“ an Indictment or Presentment of
“ Trespass or Misdemeanor, before Tri-
“ al had, from a Court of General or
“ Quarter Sessions, into the Court of
“ King’s Bench, be convicted, the Court
“ shall give reasonable Costs to the Pro-
“ secutor, if he be the Party grieved
“ or injured, or if he be a civil Officer,
“ who shall prosecute upon the Account
“ of any Fact committed or done, that
“ con-

“ cerned him as an Officer to prosecute
 “ or present ; which Costs shall be tax-
 “ ed according to the Course of the
 “ Court ; and that the Prosecutor, for
 “ the Recovery of such Costs, shall,
 “ within ten Days after Demand made
 “ of the Defendant and Refusal of Pay-
 “ ment, on Oath have an Attachment
 “ granted against the Defendant, by the
 “ Court for such his Contempt ; and
 “ the said Recognisance shall not be
 “ discharged, until the Costs so taxed
 “ shall be paid.”

Rex v. Sin-
 gleton.
 1 Will. 140.

Upon a Rule to shew Cause, why a
 Recognizance, entered into upon remov-
 ing an Indictment from a Court of
 Quarter Sessions, should not be dis-
 charged, it appeared ; that the Indict-
 ment was for an Attempt to set Fire to
 the House of J. S. ; that *Mason* and
Glenton were bound over to prosecute ;
 and that the Defendant had been con-
 victed and fined. The Rule was made
 absolute ; and by the Court : The 5
 & 6 W. & M. c. 11. extends only to
 Prosecutions by Officers and Persons
 injured ; and neither *Mason* nor *Glenton*
 was

was in the present Case injured, nor was either of them an Officer.

It has been holden ; that if a Defendant have been convicted, upon an Indictment removed by him from a Court of Quarter Sessions, the Prosecutor, in Case he be a civil Officer, is entitled to Costs, although his Name be not endorsed upon the Indictment ; and by Lord *Mansfield* Ch. J. the Prosecutor is, in such Case, entitled to Costs under the 5 & 6 W. & M. c. 11. if the Defendant were in Fact a civil Officer ; and, as it is in the present Case sworn in an Affidavit, that the Prosecutor was a civil Officer, this is Proof of his being so, sufficient to entitle him to Costs ; although his Name be not endorsed upon the Indictment, as by that Statute is directed to be done.

MS. Rep.
Rex v. Smith.
Mich. 30 G. 2.

The Defendant having been convicted, upon an Indictment removed by him from a Court of Quarter Sessions, and having paid a Fine of a hundred Pounds, a Question arose, whether either he or his Sureties were liable

MS. Rep.
Rex v. Osborn, Trin.
5 G. 3.

ble to Costs, by virtue of the Recognizance entered into upon removing the Indictment? It was holden, that they were all liable; and by Lord *Mansfield* Ch. J. the Payment of a Fine by the Defendant is no Discharge to him, or his Sureties, of the Obligation they are under to pay the Costs.

Str. 1165.
Rex v. Sidney

Upon removing an Indictment, from a Court of Oyer and Terminer, the Defendant and his Bail entered into a Recognizance, in the Sum of five hundred Pounds, the Conditions of which were; that he should plead and go to Trial, and if found guilty appear to receive Judgment. The Defendant having afterwards received Judgment, the Question, upon a Motion to discharge the Recognizance, was, whether it should be discharged, before he had paid the Prosecutor his Costs? It was holden; that the Prosecutor was not entitled to any Costs; the Recognizance being a Recognizance at the Common Law, and not one under the 5 & 6 W. & M. c. 11.

The

The Defendant and his Bail had, upon removing an Indictment from the Court of Oyer and Terminer at *Hick's-Hall*, entered into a Recognisance, in the Sum of two hundred Pounds. Upon a Rule to shew Cause, why the Recognisance should not be discharged, the Conditions thereof having been performed, it was insisted for the Prosecutor; that the Court at *Hick's-Hall* is a Court of Quarter Sessions, as well as a Court of Oyer and Terminer; and that, although the Recognisance be not in the Sum of twenty Pounds, which is the Sum directed by the 5 & 6 *W. & M. c. 11.* as the Defendant has had the Benefit thereof, the Court ought not to discharge it, until the Prosecutor is paid his Costs. The Rule was made absolute; and by the Court: The Case of *The King v. Sidney*, *Str. 1165.* is an Authority in Point.

MS. Rep.
Rex v. Fon-
seca.
Mich. 30 G. 2

After the Defendant had paid Costs, for not proceeding to the Trial of an Indictment removed by him, the Prosecutor moved for Leave to quash the Indictment. The Court refused to give Leave,

Str. 946.
Rex v. Moor.

Leave, unless the Prosecutor would consent to pay the Defendant his Costs.

MS. Rep.
Rex v. Gale,
Hil. 1 G. 3.

And in a late Case, wherein the Prosecutor of an Indictment moved for Leave to quash the Indictment, the Court refused to give Leave; unless the Prosecutor would consent to pay the Defendant his Costs.

Salk. 193.
Rex v. Edwards.

It is in one Case said; that the Prosecutor of an Indictment is liable to Costs, for not proceeding to Trial pursuant to Notice.

MS. Rep.
Rex v. Rof-
fiter. Trin.
1 G. 3.

But it was in a late Case holden; that, although the Prosecutor of an Indictment have given Notice of Trial, and did not afterwards give Notice of countermand, he is not liable to Costs for not proceeding to Trial; and by the Court: There is no Instance of a Prosecutor having paid Costs in such Case.

MS. Rep.
Rex v. Inha-
bitants of
Chelsea.
Trin. 33 G. 2.

The Defendants after pleading Not Guilty, to an Indictment for not repairing a Highway, moved, upon a Certificate from two Justices of the Peace, that

that the Highway had since the finding of the Indictment been sufficiently repaired, for Leave to withdraw the Plea of Not Guilty; and to plead Guilty, and to submit to a small Fine. The Court would not give Leave to do these, unless the Defendants would consent to pay the Prosecutor his Costs as between Attorney and Client; which being agreed to, a small Fine was set.

The Defendant in an Indictment, who had obtained a Rule for a special Jury, carried the Record to the Assize, and entered it. When the Cause was called on, no more than five of the special Jury appeared, and the Defendant, notwithstanding he had a Warrant from the Attorney General for that Purpose, did not pray a *Tales*. The Cause being hereupon made a *Remanet*, it became afterwards a Question, whether the Recognisance, entered into upon removing the Indictment from a Court of Quarter Sessions, should not be estreated? Unless the Defendant would consent to pay the Prosecutor Costs for not proceeding to Trial. It was holden,

MS. Rep.
Rex v. Righ-
ton. East.
5 G. 3.

that it should not; and by Lord *Mansfield* Ch. J the Defendant has not been guilty of any Default. He had a Right to have his Cause tried by a special Jury; and, as a full Jury did not appear, he was not bound to make Use of the Warrant for praying a *Tales*. The Prosecutor might, if he had applied for it, have likewise had such Warrant.

Salk. 55.
Reg v. Sum-
mers.

It is in one Case laid down; that a Defendant in an Indictment, who is liable to Costs under the 5 & 6 *W. & M. c. 11.* is only liable thereto, from the Time of allowing the *Certiorari* for removing the Indictment.

MS. Rep.
Rex v. Wal-
lace. Mich.
14 G. 3.

And the same was laid down in a very late Case: Upon a Rule to shew Cause, why the Taxation of Costs should not be reviewed, it appeared; that the Indictment had been removed by the Defendant from a Court of Quarter Sessions; that the Defendant had been convicted; and that the Master had allowed the Costs of the Proceedings, antecedent to the Allowance of the *Certiorari* for removing the Indictment. The Rule

Rule was made absolute; and by the Court: The Prosecutor is not in such Case entitled, under the 5 & 6 W. & M. c. 11. to the Costs of the Proceedings antecedent to the Allowance of the *Certiorari*.

The Court of King's-Bench is empowered, by a Warrant under the Privy Seal, to give any Sum, not exceeding one third Part of the Fine, which has been paid by a Defendant convicted upon an Indictment in this Court, to the Prosecutor; for reimbursing him the Expence he has been at in the Prosecution.

The Defendant having been convicted, upon an Indictment, removed by him from a Court of Quarter Sessions, and having paid a Fine of One hundred Pounds, a Question arose, whether the third Part of the Fine, which had been given to the Prosecutor, ought to be deducted from the Costs he was entitled to, by virtue of the Recognisance entered into upon removing the Indictment? It was holden that it ought;

MS. Rep.
Rex v. Osborn, Trin.
5 G. 3.

T

and

and by Lord *Mansfield* Ch. J. the third Part of the Fine, given to the Prosecutor of an Indictment, is not intended to be a Reward, but to go in Reimbursement of his Costs.

The Court of King's-Bench does usually give a Defendant, who has been convicted upon an Indictment for an Injury of a private Nature, Leave to go before the Master; in order to make Satisfaction to the Prosecutor for the Injury and his Costs; which being done, a small Fine is usually set.

It is usual, for other Courts to set a small Fine, where a Defendant has been convicted upon an Indictment for an Injury of a private Nature, if it appear, by a Release from the Prosecutor, that Satisfaction has been made to him; and the making of Satisfaction is frequently recommended by the Court.

Sayer. 195.
Rex v. Tew
and Soame,
Hil. 28 G. 2.

It may be inferred from a modern Case, that the Court will not set a large Fine, where a Defendant has been convicted upon an Indictment for an Injury

ry of a private Nature, although the Defendant refuse to go before the Master. Two Defendants, who had been found guilty upon an Indictment, being brought up for Judgment, it appeared ; that the Indictment was for an Assault and Battery ; and that the Expence of the Prosecution amounted to near Two hundred Pounds. As the Defendants would not consent to go before the Master, the Court was moved to set such a Fine ; that a third Part thereof may be sufficient, to reimburse the Prosecutor a considerable Part of his Expence. A Fine of thirty Pounds was set upon each of the Defendants ; and by *Ryder* Ch. J. it has been said ; that in the Case of *Rex v. Dyke* and three others, *Trin. 21 & 22 G. 2.* this Court did set a large Fine, upon the Defendants, found guilty upon an Indictment, with a declared Intention, that a third Part thereof might be sufficient, to reimburse the Prosecutor a considerable Part of his Expence : But the Indictment in that Case was for a public Nuisance, for which no Action could be maintained ; whereas the Indictment

in the present Case is for a private Injury, for which an Action might have been maintained.

In some modern Cases, wherein Defendants have been convicted upon Indictments for public Nuisances, the Court set large Fines ; because the Defendants would not consent to go before the Master.

MS. Rep.
Rex v. Dyke
and three
Others. Trin.
21 & 22 G.2.

In one Case, wherein four Defendants, who had been convicted upon an Indictment for removing a Foot-Bridge, would not consent to go before the Master, a Fine of fifty Pounds was set upon every one of them ; and by the Court : If the Court do not set such a Fine, on the Person convicted upon an Indictment for a public Nuisance, who refuses to go before the Master, that the third Part thereof may be sufficient, to reimburse the Prosecutor a considerable Part of his Expence, it will be a great Discouragement to Prosecutions for publick Nuisances. In this Case, the Case of the *Queen v. Barker*, which was in the Court of King's-Bench in
the

the Time of *Parker* Ch. J. was mentioned by *Lee* Ch. J. in which Case, because the Defendant, who had been convicted upon an Indictment for refusing to execute a Process, would not consent to go before the Master, a Fine of Two hundred Pounds was set.

In another Case, wherein a Rule was made to shew Cause, why a small Fine should not be set upon the Defendant, who had been convicted upon an Indictment, it appeared; that the Indictment which was found at a Court Conservancy, for an Incroachment of about five Yards in Length upon the River *Thames*, had been removed by the Defendant into this Court; and that the Nuisance was now abated. The Rule was discharged; and by the Court: As the Defendant will not consent to go before the Master, it is not proper to set a small Fine. It has been said; that, as a Recognizance for the Payment of Costs was not entered into upon removing this Indictment, such Recognizance being only required upon the Removal of an Indictment from a Court of Quarter
T 3 Sessions,

Sayer
Rex v. Goodman, Hil:
25 G. 2.

Sessions, the Prosecutor is not entitled to Costs: But this Circumstance, that the Prosecutor is not entitled to Costs, because a Recognizance was not entered into for the Payment thereof, renders it more improper, for the Court to discharge the Defendant upon the Payment of a small Fine. It is, on the contrary, quite proper; that the Court should, as was done in the Case of *Rex v. Dyke, Trin. 21 & 22 G. 2* set such a Fine; that a third Part thereof may be sufficient, to reimburse the Prosecutor a considerable Part of his Costs; for, unless a Prosecutor is, in a Case like the present, to have a considerable Part of his Costs, it will be a great Discouragement to Prosecutions for public Nuisances. In the Case of *Rex v. Haddock, Hil. 12 G. 2.* which was a Conviction upon an Indictment for a publick Nuisance, the Court, notwithstanding the Nuisance was abated, refused to set a small Fine, unless the Defendant would consent to go before the Master; and, upon this Refusal, the Defendant did consent to go before the Master.

The

The Doctrine of the Cases last mentioned was not adhered to, by the Court of King's-Bench, in some subsequent Cases.

In one Case, wherein the Point although not directly in Question, appears to have been well considered; *Ryder* Ch. J. expressed himself to the following Purport: "We desire to have
" it understood; that, whatever may have
" been heretofore done, the Court will
" not for the Time to come set a larger
" Fine, in any Case of a Conviction
" upon any Indictment, than the Na-
" ture of the Offence does require; al-
" though the Defendant refuse to go
" before the Master."

Sayer 231.
Rex v. Nichols and Another, Trin.
28 & 29 G. 2.

In another Case, wherein the Defendant had been convicted, upon an Indictment for a publick Nuisance, it appearing; that the Nuisance was abated, a Fine of six Shillings and Eight-pence was set; and by Lord *Mansfield* Ch. J. the Nuisance being abated, it is by no Means proper to set a large Fine, although the Defendant has refused to go before the Master.

MS. Rep.
Rex v. Warren, Trin.
29 & 30 G. 2.

MS. Rep.
Rex v. Bradshaw.
Trib. 29 & 30
G. 2.

In another Case, wherein the Defendant had been convicted, upon an Indictment for not repairing a Bridge in the Highway, the Court, upon the Production of a Certificate, that the Bridge had, since the Conviction, been sufficiently repaired, set a small Fine; although the Defendant would not consent to go before the Master.

C H A P. XLIII.

Of Costs, in an Information for
a Misdemeanor.

A Rule to shew Cause, why an Information should not be filed against *Palmer* and *Baine*, two Justices of the Peace, and others, for Misbehaviour in the Conviction of a Poacher, was discharged without Costs as to the others, but with Costs as to the Justices; and by the Court: Although a Justice of the Peace have acted illegally, which is by no Means the present Case, if it do not appear clearly; that he was influenced by Malice or Revenge; or that he had an Intention to oppress, this Court will never give Leave to file an Information against him: But will leave the Party complaining to the ordinary Remedies in such Case, which are an Action or an Indictment.

MS. Rep.
Rex v. Palmer and
Baine and
others, East.
1 G. 3.

The

The Court of King's Bench is empowered, by a Warrant under the Privy Seal, to give the Prosecutor of an Information for a Misdemeanor, any Sum, not exceeding a third Part of the Fine which has been paid by a Defendant convicted thereupon, towards defraying the Expence of the Prosecution.

MS. Rep.
Anon. East.
31 G. 2.

Leave was given for the Defendant, who had been convicted upon an Information for a Libel, to go before the Master, and by Lord *Mansfield*, Ch. J. This Prosecution is for an Injury of a private Nature, in which Case the Court does usually give a Defendant, who has been convicted, leave to go before the Master; and does always consider his having made Satisfaction to the Prosecutor, in setting the Fine. In the present Case, a Fine of six Shillings and eight Pence was set.

By the 4 & 5 *W. & M. c.* 18. it is enacted: "That the Clerk of the Crown
" in the Court of King's-Bench shall
" not, without exprefs Order, to be
" given by the said Court in open Court,
" exhibit,

“ exhibit, receive or file, any Informa-
“ tion for any Trespass, Battery or other
“ Misdemeanor, or Issue any Process
“ thereupon, before he shall have taken,
“ or shall have delivered to him, a Re-
“ cognisance, from the Person or Per-
“ sons procuring such Information to
“ be exhibited, with the Place of his
“ or their Abode, Title or Profession,
“ to be entered, to the Person or Per-
“ sons against whom such Information
“ is to be exhibited, in the Penalty of
“ twenty Pounds, that he, she, or they,
“ will effectually prosecute such Infor-
“ mation, and abide, and observe, such
“ Orders as the Court shall direct; and
“ in Case any Person or Persons, against
“ whom such Information shall be ex-
“ hibited in the Court of King's-Bench,
“ shall appear thereunto, and plead to
“ Issue, and the Prosecutor or Prose-
“ cutors of such Information, shall not,
“ at his and their own Costs, within
“ one Year after Issue joined therein,
“ procure the same to be tried; or if
“ upon such Trial a Verdict pass for the
“ Defendant or Defendants; or in Case
“ the Informer or Informers procure
“ a *Noli*

“ a *Noli Prosequi* to be entered ; then in
 “ any of the said Cases the said Court
 “ of King’s-Bench is hereby authorised,
 “ to award to the Defendant or De-
 “ fendants his or their Costs, unless the
 “ Judge, before whom such Informa-
 “ tion shall be tried, shall at the Trial
 “ thereof, in open Court, certify upon
 “ the Record, that there was a reason-
 “ able Cause for exhibiting such In-
 “ formation : And in Case the Informer
 “ or Informers shall not, within three
 “ Months after the Costs are taxed and
 “ Demand made thereof, pay the Costs,
 “ then the Defendant or Defendants
 “ shall have the Benefit of the Recog-
 “ nifance,” which the Informer or In-
 formers are by this Statute required
 to enter into before exhibiting the In-
 formation, to compel him or them
 thereunto.

Salk. 194.
 Reg v. Dan-
 vers.

It has been holden ; that, if any one
 Defendant in an Information for a Mis-
 demeanor have been found guilty, the
 Court of King’s-Bench has not a Power
 to award Costs to any other Defendant

in the same Information, who has been acquitted.

This Construction of the 4 & 5 *W. & M. c.* 18. is conformable, to the Construction which had been always put upon the Statutes, whereby Costs are given to Defendants in civil Actions; namely, that no Defendant, for whom there is a Verdict, is entitled to Costs, in Case there be a Verdict against any other Defendant in the same Action.

Upon a Rule to shew Cause, why the Defendant, for whom there was a Verdict in an Information for a Libel, should not have Costs, it appeared, from the Report of the Ch. J. before whom the Information was tried; that the Verdict was against Evidence, and contrary to his Direction. The Rule was made absolute; and by the Court: As a Certificate, that there was a reasonable Cause for exhibiting the Information, was not applied for at the Trial, it is now too late to enquire into the Reasonableness

Str. 1131
Rex v. Woodfall.

ableness of that Cause. It was likewise holden; that, although the 4 & 5 *W. & M.* does only authorize the Court to award the Defendant Costs, in Case there be no Certificate, the Court has not a discretionary Power in such Case, but is bound to award them.

2 Hawk. Pl.
C. 263.

It is laid down; that the Court of King's-Bench is as much bound to award Costs, where the Verdict for the Defendant in an Information for a Misdemeanor is upon some Slip in a Matter of Form, as it had been upon the Merits; for that the Words of the 4 & 5 *W. & M. c. 18.* which are general, extend to every Case of a Verdict for the Defendant or Defendants, unless the Judge, before whom the Information was tried, do certify, that there was a reasonable Cause for exhibiting such Information.

2 Hawk. Pl.
C. 263.

It is said; that if an Information for a Misdemeanor be tried at Bar, the Court of King's-Bench is not empowered by the 4 & 5 *W. & M. c. 18.* to
award

award Costs to the Defendant or Defendants. Because the Words thereof :
 “ Unless the Judge, before whom such
 “ Information shall be tried, shall at
 “ the Trial thereof, in open Court,
 “ certify upon the Record, that there
 “ was a reasonable Cause for exhibit-
 “ ing such Information,” do manifestly
 relate to a Trial at *Nisi Prius* : It being
 absurd to suppose ; that a Statute should
 enable the Justices of the Court of
 King’s-Bench, to certify to themselves
 concerning a Trial before themselves.
 Another Reason given is ; that an In-
 formation, of such Consequence as to
 be tried at Bar, is not within the Pur-
 view of the 4 & 5 *W. & M. c.* 18. the
 Design of that Statute only being, to
 give Costs in Informations of a tri-
 vial Nature.

A Rule was in one Case made ; that
 the Prosecutor of an Information for a
 Misdemeanor should pay Costs, for not
 proceeding to Trial pursuant to No-
 tice.

Str. 874.
 Rex v. Earl.

And

MS. Rep.
Rex v. Hey-
don. 2 G. 3.
in K. B.

And in a late Case, wherein a Rule of the same Kind was made, it was said by Lord *Mansfield* Ch. J. to be a settled Point; that the Defendant in an Information for a Misdemeanor, is entitled to Costs, in Case the Prosecutor do not proceed to Trial pursuant to Notice.

C H A P. XLIV.

Of Costs, in an Information in
the Nature of a *Quo Warranto*.

U P O N a Rule to shew Cause, why
an Information in the Nature of a
Quo Warranto should not be filed against
a Person, for claiming to vote at the
Election of a Mayor, it appeared; that
the Person had a Right to vote at such
Election. The Rule was discharged
with Costs: But the Reporter adds
Quod nota as to the Costs.

Str. 1039.
Rex v. Car-
penter.
East. 9 G. 2.

What Doubt soever there may for-
merly have been, as to the Power of
the Court of King's-Bench to give Costs,
upon discharging a Rule to shew Cause,
why an Information in the Nature of
Quo Warranto should not be filed, it is
certain; that the Court does at this
Day exercise the same discretionary
Power, of discharging such a Rule with
or without Costs, as it does in discharg-

MS. Rep.
Rex v. Lewis,
East. 32 G. 2.

U

ing

ing a Rule to shew Cause, why an Information for a Misdemeanor should not be filed. Upon a Rule to shew Cause, why an Information in the Nature of a *Quo Warranto* should not be filed against a Person, for acting as a capital Burgeſs and Alderman of *New Radnor*, it appeared ; that the Charge was both groundleſs and frivolous ; and that the Proſecutor muſt have known it to be ſo, at the Time he applied to the Court. The Rule was diſcharged with Coſts.

By the 9 *Ann. c. 20.* it is enacted :
 “ That in Caſe any Perſon, againſt
 “ whom an Information in the Nature
 “ of a *Quo Warranto* ſhall be exhibited,
 “ in the Court of Queen’s-Bench, the
 “ Courts of Seſſions of the Counties
 “ Palatine, or any Court of Grand Seſ-
 “ ſions in *Wales*, ſhall be found and
 “ adjudged guilty of an Uſurpation, or
 “ Intruſion into, or unlawfully holding
 “ and executing any Office or Franchiſe,
 “ within a City, Town corporate, Bo-
 “ rough or Place, it ſhall be lawful for
 “ the ſaid Courts reſpectively to give
 “ Judgment of *Ouſter* againſt ſuch Per-
 “ ſon,

“ son, and also to give Judgment, that
 “ the Relator or Relators, in such In-
 “ formation named, shall recover his or
 “ their Costs of the Prosecution; and
 “ if Judgment shall be given for the
 “ Defendant or Defendants in such In-
 “ formation, he or they, for whom
 “ such Judgment shall be given, shall
 “ recover his or their Costs against such
 “ Relator or Relators; such Costs to
 “ be levied by *Capias ad Satisfaciendum*,
 “ *Fieri Facias*, or *Elegit*.”

Upon a Rule to shew Cause, why the
 Prosecutor of an Information in the
 Nature of a *Quo Warranto* should not
 pay Costs, it appeared; that the Pro-
 secutor had, pursuant to the 4 & 5 W.
 & M. c. 18. entered into a Recognisance
 in the Penalty of twenty Pounds; that
 the Defendant had appeared, and plead-
 ed to Issue; that the Prosecutor had
 not within one Year after Issue joined
 procured the Information to be tried;
 that the Defendant's Costs had been
 taxed, and demanded; and that
 the Prosecutor had not paid them. A

Rep. Time of
 Hardw. 248.
 Rex v. How-
 ell.

Rule was made ; that the Defendant should have his Costs, as far as the Recognisance extended ; and by Lord *Hardwicke* Ch. J. it has been said ; that this Information, it not being for a Misdemeanor, is not within the Meaning of the 4 & 5 *W. & M. c. 18.* But it is now too late to make that Objection, as the Practice has always been, to enter into a Recognisance pursuant to that Statute, in an Information in the Nature of *Quo Warranto* ; which Practice must have been founded upon a Supposition, that such Informant is within the Meaning of that Statute. If there had been Judgment for the Defendant, he would have been entitled to his whole Costs under the 9 *Ann. c. 20.* But as there is not, he is not entitled to more Costs, than the Penalty of the Recognisance extends to.

MS. Rep.
Rex v. Wil-
liams, East.
1 G. 3.

The Defendant had been convicted, upon an Information in the Nature of a *Quo Warranto*, which charged an Usurpation of the Office of holding a Court

Court of Record in a Borough, in the Absence of the two Bailiffs; whereas, by the Charter, the said Court could only be holden before the two Bailiffs or one of them; and Judgment of *Ouster* was given against him, and that the Relator should recover his Costs. A Writ of Error being brought upon the Judgment, that Part thereof which related to Costs was reversed; and by the Court: The Prosecutor of an Information in the Nature of a *Quo Warranto* is not entitled to Costs, under the 9 *Ann. c. 20.* unless the Information be for usurping, intruding into, or unlawfully holding and executing a corporate Office or Franchise. As the Defendant did not, in the present Case, assume to hold the Court as Bailiff, he did not usurp any corporate Office or Franchise. It has been said, that the Words "Franchises in Corporations or Boroughs," which are contained in the Title of that Statute, extend to the Franchise of holding a Court in a Borough: But it is clear, from the Preamble and enacting Part of the Statute,

that the Word Franchise, as therein used, is confined to the Freedom of a City, Town corporate, Borough or Place; and does not extend to every Franchise, which may be exercised in a City, Town corporate, Borough or Place.

C H A P. XLV.

Of Costs, in a Traverse of a Fact,
contained in the Return to a
Writ of *Mandamus*.

AS Damages were recoverable, at the Common Law, in an Action upon the Case for a false Return to a Writ of *Mandamus*, the Plaintiff in such Action may recover Costs under the Statute of *Gloucester*, c. 1. and consequently, the Defendant in such Action may recover Costs under the 4 *Ja.* 1. c. 3.

Before the making of the 9 *Ann.* c. 20. there was no other Remedy, for the Person injured by a false Return to any Writ of *Mandamus*, than an Action upon the Case. By that Statute it is enacted: “ That if any Writ of *Man-*
“ *damus* shall issue out of the Court of
“ *Queen’s-Bench*, the Courts of Ses-
U 4 “ sions

“ fions of Counties Palatine, or any
“ Court of Grand Seffions in *Wales*, for
“ reftoring any Perfon or Perfons to an
“ Office or Franchife, within a City,
“ Town corporate, Borough or Place,
“ and a Return fhall be made thereunto,
“ it fhall be lawful, for the Perfon or
“ Perfons fuing or profecuting fuch
“ Writ, to plead to, or traverse, all or
“ any of the material Facts contained
“ within the faid Return; to which
“ the Perfon, or Perfons, making fuch
“ Return fhall reply, take Ifsue, or de-
“ mur; and fuch further Proceedings
“ fhall be had, for the Determination
“ thereof, as might have been had, if
“ the Perfon, or Perfons, fuing fuch
“ Writ had brought his or their Action
“ upon the Cafe for a falfe Return;
“ and if any Ifsue fhall be joined on
“ fuch Proceedings, the Perfon, or Per-
“ fons, fuing fuch Writ fhall and may
“ try the fame in fuch Place, as an Ifsue
“ joined in fuch Action upon the Cafe
“ fhould or might have been tried;
“ and, in Cafe a Verdict fhall be found
“ for the Perfon or Perfons fuing fuch
“ Writ, or Judgment, given for him or
“ them

“ them upon a Demurrer, or by *Nil*
“ *dicit*, or for want of a Replication or
“ other Pleading, he or they shall re-
“ cover his or their Damages and Costs,
“ in such Manner, as he or they might
“ have done in such Action upon the
“ Case; such Costs and Damages to be
“ levied by *Capias ad Satisfaciendum*,
“ *Fieri Facias*, or *Elegit*; and in Case
“ Judgment shall be given for the Per-
“ son, or Persons, making such Return,
“ he or they shall recover his or their
“ Costs of Suit, to be levied in Manner
“ aforesaid.”

C H A P. XLVI.

Of Costs in divers Cases, which did not fall under any of the preceding Chapters.

Ca. Pr. in
C. B. 41.
Hut v. Liffet.

UPON the Trial of an Issue in a *Homine replegiando*, the Plaintiff was nonsuited; a Question arising, whether the Defendant ought to have Costs? It was holden that he ought; and by the Court: As the Plaintiff, in Case he had prevailed, would have been entitled to Costs under the Statute of *Gloucester, c. 1.* Damages being recoverable at the Common Law in a *Homine replegiando*, the Defendant is entitled to Costs under the 4 *Ja. 1. c. 3.*

Rep. Time
of Hardw.
356.
Rex. v. The
Inhabitants of
Glastonby.

The Sheriff had returned an Inquisition upon a *Noctanter*: By which it was found; that the Prosecutor had sustained Damages to the Amount of a Hundred

dred Pounds, but that the Writ came to his Hands *tarde*, so that he could not restore the Damages to the Prosecutor. An *alias distringas* being awarded, to restore the Damages, *J. S.* and *J. N.* in the Name of all the Inhabitants of *Glastonby*, came and pleaded; that the Prosecutor did not sustain Damages to more than the Amount of Ten Shillings. Issue being joined upon the Plea, by the King's Coroner and the Prosecutor, the Jury found; that the Prosecutor had sustained Damages to the Amount of Seven Pounds Ten Shillings, besides Costs. The Court being moved, that Costs might be taxed for the Prosecutor, it was holden; that he was not entitled to any; and by Lord *Hardwicke* Ch. J. no Precedent is to be found, of a Judgment for Costs in a *Noctanter*. In the Entry of a Proceeding of this Kind, 1 *Lutw.* 141. 155. which appears to have been very well considered, and in which the Writ of Execution was corrected by Lord Ch. J. *Holt*, there is no Judgment for Costs. In that Case, indeed, the Traverse was taken upon the Writ, and not upon the Damages: But that
did

did not vary the Case; for, if the Prosecutor had been entitled to Costs, he ought as well to have had them upon that Traverse, as if it had been a Traverse of the Damages. The Statute of *Gloucester*, c. 1. does only give Costs to a Demandant or a Plaintiff: But in the present Case, which, as was holden 1 *Sid.* 112. is only a Traverse of an Inquisition, there is neither Demandant nor Plaintiff. It is very reasonable; that the Prosecutor should in such Case have Costs: But that will not warrant the Court to award him Costs, unless he be entitled thereto under some Statute.

Pr. Reg. 7.
Osborn v.
Haddock.

The Defendant having pleaded in Abatement to one Action, the Plaintiff confessed the Plea, and entered a *Cassetur Breve* upon the Roll. A second Action being brought for the same Cause, the Defendant pleaded the Pendency of the former Action in Abatement, to which the Plaintiff replied the *Cassetur Breve*. A Question arising, whether the Plaintiff could enter a *Cassetur Breve* without the Leave of the Court, or the Payment of Costs? It was holden, upon

on advising with the Prothonotaries, that he might.

Upon a Rule to shew Cause, why the Proceedings should not be stayed upon the Payment of Costs in this Action, it appeared; that the Defendant was one of the Bail of *J. S.*; that the Bail Bond having been assigned, one Action was brought upon it against the Principal; another against the Defendant; and another against the other Bail; and that the Debt was afterwards paid by the Defendant. The Rule was discharged; and by the Court: It is not reasonable; that the Proceedings in this Action should be stayed; unless the Costs are paid in the Actions against the Principal, and the other Bail, as well as in this Action.

MS Rep.
Walker v.
Carter, East.
12 G 3.
in C. B.

Upon a Rule to shew Cause, why the Proceedings in an Action of Debt upon a Bail Bond should not be stayed, upon Payment of Principal, Interest and Costs, it appeared; that some Costs had been incurred by the Plaintiff in a Suit in the Court of Exchequer relative to the same

Rep. Time of
Hardw. 116.
Lock v. Sher-
mer.

same Matter. A Rule was made, for staying the Proceedings upon Payment of the Principal, Interest and Costs, in this Action, and of the Costs in the Court of Exchequer.

2 Will. 7.
Thrustout v.
Bedwell.

The Lessor of the Plaintiff died before the Commission Day of the Assize. The Cause was nevertheless called on, and the Plaintiff was nonsuited ; because the Defendant did not confess Lease, Entry and Ouster. The Court being moved, that the Prothonotary might tax Costs upon the Consent Rule, for the Executors of the Lessor of the Plaintiff, it was holden ; that the Executors were not entitled to any Costs upon that Rule ; it being personal.

MS: Rep.
Mills, Bart.
v. Rolle.
Hil 1 G. 3.
in K. B.

Upon a Motion for a Rule to shew Cause, why Sir *Richard Mills*, Baronet, should not pay Costs, on Account of the Cause not having been tried pursuant to Notice, it appeared ; that Sir *Richard's* Father, by whom the Action was brought, had given Notice of Trial ; that the Cause was not tried ; and that the Father, to whom Sir *Richard* is Executor,

was

was dead. No Rule was made ; and by Lord *Mansfield* Ch. J an Executor is not in such Case liable to any Costs. The Court of Chancery does never revive a Bill for the sake of Costs alone.

The Court being of Opinion with the Defendant, upon a Case reserved at *Nisi Prius*, a Rule of Court was made ; that the Verdict taken for the Plaintiff should be set aside ; and that the Plaintiff should pay the Defendant the Costs of a Nonsuit. As the Defendant died after the Costs were taxed ; a Question arose, whether his Executor was entitled to the Costs ? It was holden that he was ; and an Attachment was awarded against the Plaintiff for Non-payment thereof.

Pr Reg. 117.
Hammond v.
Woolmer.

Upon the Trial of an Ejectment, wherein two Persons were Defendants, one of them confessed Lease, Entry and Ouster, and there was a Verdict against him. As the other did not confess Lease, Entry and Ouster, and consequently, the Plaintiff was not entitled to Costs as against him, the Court made a Rule to shew Cause, why he should not pay

1 Barn. 94.
Goodright v.
Tregurtha
and another.

pay Costs ; which, no Cause being shewn, was afterwards made absolute.

2 Barn. 106.
Broadbent v.
Wilks.

After the Defendant, in an Action of Trespass *vi et armis*, had by his Plea confessed the Trespass, the Plaintiff replied. Issue being joined upon the Replication, a Verdict was found for the Defendant : But the Court, notwithstanding the Verdict, gave Judgment for the Plaintiff, and a Writ of Enquiry was executed. A Question arising, what Costs the Plaintiff ought to be allowed ? It was holden ; that he ought to be allowed all the Costs, except those of the Trial.

Pr. Reg. 449.
Suttle v. Lay-
ton.

After a Writ of Enquiry had been executed, at the Execution of which the Defendant made Defence, the Plaintiff moved for Leave to quash the Writ. Leave was given : But it was made Part of the Rule for giving Leave ; that he should pay the Costs of the Defendant in making Defence.

MS. Rep.
Porter v.
Stears, Trin.
30 G. 2. in
K. B.

Upon a Rule to shew Cause, why Leave should not be given to enter Judgment as of *Michaelmas* Term last, and to
tax

tax Costs thereupon, it appeared; that Judgment might have been entered upon the eleventh of *November* last; that there was an Appointment for taxing Costs upon the sixteenth of that Month; and that the Plaintiff died upon the thirteenth. The Rule was discharged, as being unnecessary; and by the Court: As the Plaintiff lived beyond the Day in Bank, Judgment may without Leave of the Court be entered as of *Michaelmas* Term last; and Costs, notwithstanding the Death of the Plaintiff, may be taxed thereupon.

A Rule, for an Attorney to answer the Matters of an Affidavit, was discharged with Costs; and by Lord *Mansfield* Ch. J. wherever the Charge against an Attorney is such, that the Consequence, in Case the Rule should be made absolute, would be an Attachment, the Rule, if discharged, ought to be discharged with Costs; such a Charge being a great Imputation upon an Attorney.

MS. Rep.
Hopkins v.
Humphrys,
Mich. 31 G. 2.
in K. B.

MS. Rep.
Rex. Wake-
field and
others.
Hil. 32 G. 2.

A *Certiorari*, procured by the Defendants, who were Quakers, for removing an Order of two Justices concerning Tithes, which had been confirmed by a Court of Quarter Sessions, was superseded, *quia improvide emanavit*. A Question arising, whether the Recognizance, entered into by the Defendants in order to obtain the *Certiorari*, should be discharged, before the Costs thereby occasioned shall be paid? It was holden, that it should; and by Lord *Mansfield* Ch. J. the Defendants ought in Justice to pay Costs, for having most grossly abused a Statute made in their favour: But, as the Costs were occasioned by an improvident Act of the Court, they are not by Law liable thereto.

MS. Rep.
Rex v. Plun-
ker. Trin
2 G. 3. in
K. B.

Upon a Rule to shew Cause, why an Attachment should not be awarded against a Person, for not attending the Trial of a Cause pursuant to a *Subpœna*, the Complaint, upon which the Rule was made, appeared to be so very groundless, that, contrary to the usual Practice of the Court, it was discharged with Costs.

By

By the 24 G. 2. c. 44. it is enacted :
 “ That no Action shall be brought
 “ against any Constable, Headborough
 “ or other Officer, or against any Per-
 “ son or Persons, acting in his Aid, for
 “ any Thing done in Obedience to any
 “ Warrant, under the Hand or Seal of
 “ any Justice of the Peace, until De-
 “ mand hath been made, or left at the
 “ usual Place of his Abode, by the Par-
 “ ty or Parties intending to bring such
 “ Action, by his, her, or their Attor-
 “ ney or Agent in Writing, signed by
 “ the Party demanding the same, of the
 “ Perusal and Copy of such Warrant,
 “ and the same hath been refused or
 “ neglected for the Space of six Days
 “ after such Demand ; and in Case,
 “ after such Demand and Compliance
 “ therewith, by shewing the said War-
 “ rant to and permitting a Copy to be
 “ taken thereof by the Party demand-
 “ ing the same, any Action shall be
 “ brought against such Constable, Head-
 “ borough or other Officer, or against
 “ such Person or Persons acting in his
 “ Aid, for any such Cause as aforesaid,
 X 2 “ without

“ without making the Justice or Justices
“ of the Peace, who signed or sealed the
“ said Warrant, Defendant or Defend-
“ ants, that on producing and proving
“ such Warrant, at the Trial of such
“ Action, the Jury shall give their Ver-
“ dict for the Defendant, or Defend-
“ ants, notwithstanding any Defect of
“ Jurisdiction in such Justice or Justices;
“ and if such Action be brought jointly
“ against such Justice or Justices, and
“ also against such Constable, Head-
“ borough or other Officer, or Person
“ or Persons acting in his or their Aid,
“ then, on Proof of such Warrant, the
“ Jury shall find for such Constable,
“ Headborough or other Officer, and
“ for such Person or Persons so acting
“ as aforesaid, notwithstanding such
“ Defect of Jurisdiction; and if the
“ Verdict shall be given against the Jus-
“ tice or Justices, that in such Case the
“ Plaintiff or Plaintiffs shall recover his,
“ her or their, Costs against him or
“ them; to be taxed in such Manner,
“ as to include such Costs, as such Plain-
“ tiff or Plaintiffs are liable to pay to
“ such Defendant or Defendants, for
“ whom such Verdict shall be found.”

C H A P.

C H A P. XLVII.

Of the Liability of an Attorney in
a Cause to pay Costs.

M A N Y Mistakes having been made by the Plaintiff's Attorney, in the Copy of a *Capias*, a Rule was made for him to shew Cause, why he should not pay, to both Plaintiff and Defendant the Costs occasioned by those Mistakes.

¹ Barn. 302.
White v.
Washington.

A. R the Defendant's Attorney had, eleven Years before, without the order or privity of the Defendant, pleaded two Judgments; one upon a Bond to the Defendant; the other upon a Bond to a Person, to whom the Defendant was Executor; notwithstanding the Attorney had himself received, for the Defendant, the Money due upon both Bonds. A Rule was made, upon an Affidavit of these Facts, for the Plain-

² Barn. 290.
Lamb v.
Goodenough.

tiff to shew Cause, why the Judgments should not be stricken out of the Plea; and *A. R.* was thereby ordered to answer the Matters of the Affidavit. Upon hearing all Parties, a Rule was entered into by Consent; that *A. R.* should pay the Plaintiff's Costs from the Commencement of the Action, and that thereupon the Plaintiff should discontinue his Suit; that *A. R.* should pay the Costs of the present Application, both to the Plaintiff and Defendant; and that no Action should be brought by the Defendant against *A. R.* on Account of any Thing relative to this Action.

2 Barn. 4.
Fowke v.
Horabin.

Upon a Motion in Arrest of Judgment, it was holden; that every Part of the Record objected to was amendable, and the proper Amendments were ordered to be made: But, as the Necessity of making Amendments arose from gross Blunders of the Plaintiff's Attorney, a Rule was made, for him to pay the Costs occasioned by the Amendments.

The

The Plaintiff's Attorney, who, by the Rule of the Court, had a Right to sign Judgment for want of a Plea on a *Tuesday* in the Afternoon, was on the Day before served with a Judge's Summons, to shew Cause at six in the Afternoon of the *Tuesday*, why the Defendant should not have further Time to plead. Notwithstanding this Summons, he signed Judgment in the Afternoon of the *Tuesday*. Upon an Application for setting aside the Judgment, it was holden; that, as the Judgment was strictly regular, nothing being in any Case stayed by a Judge's Summons, it could not be set aside without paying costs: But the Court being of Opinion, that there had been in this Case very sharp Practice, a Rule was made, for the Plaintiff's Attorney to shew Cause, why the Costs should not be paid by him.

MS. Rep.
Atkinson v.
Burton. East.
30 G. 2. in
K. B.

Upon a Rule to shew Cause, why an Information should not be filed against a Justice of the Peace, the Complaint appeared to be so frivolous, that the Court had no Doubt as to the Discharging of the Rule with Costs: The only

MS. Rep.
Rex v. Field-
ing. Mich.
32 G. 2.

Doubt being ; whether the Attorney should be liable to Costs, as well as the Prosecutor ? On Behalf of the Attorney it was said ; that it would be hard, to make an Attorney pay Costs, in Case a Motion he had been concerned in for his Client did not succeed ; and that it would be more hard to do this, without having first heard what he could say in Defence of himself. The Opinion of Lord *Mansfield* Ch. J. *Foster* J. and *Wilmot* J. (*Dennison* J. was absent) being, that the Attorney, as well as the Prosecutor, ought to be liable to the Costs, the Rule was discharged with Costs as to both ; and by Lord *Mansfield* : The Attorney has in the present Case not only joined with the Prosecutor in the Affidavit of Complaint ; but it is sworn in another Affidavit, that he has declared : That, if it should cost him a hundred Pound , he would lay *Fielding* by the Heels.

MS. Rep.
Driver on the
Demise of
Hinton v.
Oldham. Hil.
16 G. 3. in
C. B.

Upon a Rule to shew Cause, why the Defendant's Attorney should not pay the Costs in an Action of Ejectment, it appeared ; that the Defendant's Attorney,

ney, notwithstanding he knew the Defendant to be an Infant, appeared for him by Attorney. The Rule being discharged, on an Undertaking by the Defendant not to bring a Writ of Error, and an Undertaking by the Plaintiff not to tax the Costs; the Court gave no decisive Opinion, as to the Liability of the Attorney to pay the Costs: But it was said by the Court; that if an Attorney appear for an Infant by Attorney, it is incumbent upon the Plaintiff's Attorney, to have that Appearance stricken out, and to have a Guardian appointed; from whence it may fairly be inferred; that an Attorney is not in such Case liable to Costs.

C H A P. XLVIII.

Of taxing an Attorney's Bill.

BY the 2 G. 2. c. 23. it is enacted :
 “ That no Attorney of the Court
 “ of King's-Bench, Common Pleas,
 “ Exchequer or Duchy of *Lancaster*, or
 “ of any of his Majesty's Courts of
 “ Great Session in *Wales*, or of any of
 “ the Courts of the Counties Palatine
 “ of *Chester*, *Lancaster* or *Durham*, or of
 “ any Court of Record in that Part of
 “ *Great-Britain* called *England*, shall
 “ commence any Action for the Reco-
 “ very of any Fees, Charges or Disburse-
 “ ments at Law, until the Expiration
 “ of one Month after such Attorney
 “ shall have delivered unto the Party or
 “ Parties to be charged therewith, or
 “ left for him, her or them, at his, her
 “ or their, Dwelling-house or last Place
 “ of Abode, a Bill of such Fees, Charges
 “ and Disbursements, written in a com-
 “ mon legible Hand and in the *English*
 “ Tongue,

“ Tongue, except Law Terms and
 “ Names of Writs, and in Words at
 “ Length, except Times and Sums,
 “ which Bill shall be subscribed with
 “ the proper Hand of such Attorney :
 “ And, upon Application of the Party
 “ or Parties chargeable by such Bill, or
 “ of any Person in that Behalf autho-
 “ rised, unto any of the Courts afore-
 “ said, or unto a Judge or Baron of any
 “ of the said Courts respectively, in
 “ which the Business contained in such
 “ Bill, or the greatest Part thereof in
 “ Amount or Value, shall have been
 “ transacted ; and, upon the Submission
 “ of the said Party or Parties, or such
 “ other Person authorised as aforesaid,
 “ to pay the whole Sum, that upon
 “ Taxation of the said Bill shall appear
 “ to be due to the said Attorney, it
 “ shall be lawful for any of the Courts
 “ aforesaid, or for any Judge or Baron
 “ of any of the said Courts respectively,
 “ and they are hereby required to refer
 “ the said Bill, and the said Attorney’s
 “ Demand thereupon, although no Ac-
 “ tion or Suit shall be then depending
 “ in such Court touching the same, to
 “ be

“ be taxed and settled by the proper
“ Officer of the Court, without any
“ Money being brought into the said
“ Court; and if the said Attorney, or
“ the Party or Parties chargeable by
“ such Bill, having due Notice, shall
“ neglect to attend such Taxation, the
“ said Officer may proceed to tax the
“ said Bill *ex parte*, pending which Re-
“ ference and Taxation no Action shall
“ be commenced, or prosecuted, touch-
“ ing the said Demand; and, upon the
“ Taxation and Settlement of such Bill
“ and Demand, the said Party or Par-
“ ties shall forthwith pay to the said
“ Attorney, or to any Person by him
“ authorised to receive the same, that
“ shall be present at the said Taxation,
“ or otherwise unto such other Person
“ or Persons, or in such Manner as the
“ respective Court aforesaid shall direct,
“ the whole Sum, that shall be found
“ to remain due thereon, which Pay-
“ ment shall be a full Discharge of the
“ said Bill and Demand; and in De-
“ fault thereof, the said Party or Par-
“ ties shall be liable to an Attachment
“ or Process of Contempt, or to such
“ other

“ other Proceedings, at the Election of
 “ the said Attorney, as such Party or
 “ Parties was or were before liable un-
 “ to : And if, upon the said Taxation
 “ and Settlement, it shall be found, that
 “ such Attorney shall happen to have
 “ been overpaid, then the said Attor-
 “ ney shall forthwith refund and pay,
 “ unto the Party or Parties entitled
 “ thereto, or to any Person by him,
 “ her or them, authorised to receive
 “ the same, if present at the settling
 “ thereof, or otherwise unto such other
 “ Person or Persons, or in such Man-
 “ ner, as the respective Court aforesaid
 “ shall direct, all such Money, as the
 “ said Officer shall certify to have been
 “ so overpaid ; and in Default thereof,
 “ the said Attorney shall be liable to an
 “ Attachment or Process of Contempt,
 “ or to such other Proceedings, at the
 “ Election of the said Party or Parties,
 “ as he would have been subject unto,
 “ if this Act had not been made : And
 “ the said respective Courts are hereby
 “ authorised, to award the Costs of such
 “ Taxations to be paid by the Parties,
 “ according to the Event of the Taxa-
 “ tion

“tion of the Bill; that is to say, if
 “the Bill taxed be less, by a sixth Part
 “than the Bill delivered, then the At-
 “torney is to pay the Costs of the Tax-
 “ation; but if it shall not be less, the
 “Court in their Discretion shall charge
 “the Attorney, or Client, in Regard to
 “the Reasonableness or Unreasonable-
 “ness of such Bill.”

By the 12 G. 2. c. 13. it is enacted:
 “That the 2 G. 2. c. 23. shall not ex-
 “tend to any Bill of Fees, Charges and
 “Disbursements, that are now, or shall
 “hereafter become, due from any At-
 “torney to any other Attorney or Clerk
 “in Court: But every such Attorney
 “or Clerk in Court may use such Re-
 “medies, for the Recovery of his Fees,
 “Charges and Disbursements, against
 “such other Attorney, as he might
 “have used before the making of the
 “said Act.”

1 Barn. 196.
 Welland v.
 Rock. Mich.
 7 G. 2.

Upon a Rule to shew Cause, why the
 Proceedings in an Action, brought by
 an Attorney for Money due for Fees and
 Disbursements, should not be stayed for
 Irre-

Irregularity, because the Plaintiff had not delivered a Bill, the Court were of Opinion ; that this could not be considered as an Irregularity, and consequently that the Proceedings ought not to be stayed : But a Rule was made ; that an interlocutory Judgment, which had been signed, and a Writ of Enquiry, which had been executed thereupon, should be set aside, upon the following Terms, paying Costs, bringing Money into Court, pleading issuably, and taking short Notice of Trial.

Upon a Motion for a Rule to shew Cause, why the Proceedings in an Action, brought by an Attorney for the Money due upon a Bill of Fees and Disbursements should not be stayed, it appeared ; that the Action was commenced before the Expiration of a Month after the Delivery of the Bill. No Rule was made ; and by the Court : As this Matter may be taken Advantage of in Pleading, or at the Trial of the Cause, there is no Necessity to stay the Proceedings in the Action.

1 Barn. 96.
Harper v.
Leech. Trin.
10 G. 2.

An

MS. Rep.
Green v.
Haffel. Trin.
28 G. 2. in
K. B.

An Attorney having delivered one Bill of Fees and Disbursements, and another for Conveyancing, a Rule was made to shew Cause, why the latter Bill should not, as well as the former, be referred to be taxed. The Rule was afterwards made absolute; no Cause being shewn. In this Case the Case of *Dalston v. Hartcliff* was cited and relied upon; in which the Court of Chancery had ordered, one Bill of Fees and Disbursements, and another for Conveyancing, to be taxed.

1 Barn. 95.
Ashton v.
Molineux.
Trin. 10 G. 2.

An Action being brought in the Court of Common Pleas, for the Money due upon a Bill of Fees and Disbursements, on Account of Business done in the Court of *Doncaster*, a Rule was obtained to shew Cause, why the Bill should not be referred to the Prothonotary to be taxed. The Rule was afterwards discharged, it appearing; that the Bill had already been taxed by the proper Officer of the Court of *Doncaster*; and by the Court: It is directed, by the late Act of Parliament, that an Attorney's Bill of Fees and Disbursements shall be taxed
in

in that Court, wherein the greatest Part of the Business was transacted.

Upon a Rule to shew Cause, why the Proceedings in an Action of Debt upon a Bail Bond should not be stayed, upon Payment of Principal, Interest and Costs, it appeared; that some Costs had been incurred by the Plaintiff, in a Suit in the Court of Exchequer relative to the same Matter. A Rule was made; for staying the Proceedings, upon Payment of the Principal, Interest and Costs, in this Action, and of the Costs in the Court of Exchequer. It was likewise ordered; that the Costs in the Court of Exchequer, as well as the Costs of Action, should be referred to the Master to be taxed.

Rep. Time of
Hardw. 116.
Lock v. Sher-
mer.

An Attorney having agreed with his Client, to be paid for his Time at a certain Rate by the Day, and likewise to be allowed the Expence of a Post-chaise, the Question was, whether the Client should be bound by the Agreement? It was holden, that he should not; and the Attorney's Bill, in which there were

MS. Rep.
Anon. Hil.
32 G. 2.
in K. B.

Y

Charges

Charges conformable to the Agreement, was referred to be taxed.

1 Barn. 99.

Clarke v.

Taylor.

East 11 G. 2.

Upon a Motion, that an Attorney's Bill of Fees and Disbursements, for the Money due upon which the Action was brought, might be taxed, it appeared; that Judgment by Default had been entered; and that a Writ of Enquiry had been executed. No Rule was made; and by the Court: As the Damages are already ascertained, the Defendant is too late in his Application.

MS. Rep.

Anon.

Hil. 32 G. 2.

After an Attorney had obtained a Warrant of Attorney from his Client, for confessing Judgment for the Money due upon a Bill of Fees and Disbursements, and had entered up Judgment thereupon, it became a Question, whether the Bill should be referred to be taxed? It was holden that it should; and that in the mean Time Execution upon the Judgment should be stayed.

Pr. Reg. 37.

Maith v.

Carter.

Upon a Rule to shew Cause, why an Attorney's Bill of Fees and Disbursements should not be referred to be taxed,

ed, it appeared; that a Bond had been given for the Money due upon the Bill five Years before; and that the Vouchers had been delivered up. The Rule was discharged; and by the Court: At this Rate an Attorney would never be safe.

A Rule was made, for referring an Attorney's Bill of Fees and Disbursements to be taxed, after it had been paid five Years; and by Lord *Mansfield* Ch. J. after the Payment of an Attorney's Bill has been so long acquiesced under, the Court will not refer it to be taxed, unless there be some special Circumstances in the Case: But there are such in the present Case; and wherever there are such, neither Payment, nor a Release, nor a Judgment for the Money due, will preclude the Court from referring the Bill to be taxed.

MS. Rep.
Bennet v.
Hart, Trin.
1 G. 3. in
K. B.

An Action being brought by the Executor of an Attorney, for the Money due upon a Bill of Fees and Disbursements, on Account of Business done by

1 Barn. 90.
Lee v. Knight.
Mich. 7 G. 2.

his Testator, the Court refused to refer the Bill to be taxed.

1 Barn. 91.
Christmas v.
Chase. Mich.
7 G. 2.

A Rule, which had been obtained, during the Life of the Plaintiff, to shew Cause, why his Bill of Fees and Disbursements, for the Money due upon which the Action was brought, should not be referred to be taxed, was discharged; it appearing; that the Plaintiff died between the Time of making the Rule and the Time of shewing Cause.

1 Barn. 96.
Chapple v.
Chapman.
Tria. 10 G. 2.

The Plaintiff, an Executor to an Attorney, having delivered a Bill of Fees and Disbursements, on Account of Business done by his Testator, the Defendant moved; that, upon bringing a sufficient Sum of Money into Court, the Bill might be referred to be taxed. No Rule was made; and by the Court: Such a Rule has always been denied in this Court.

MS. Rep.
Dutton, Adm.
v. Agate
East. 29 G. 2.

An Action being brought by an Administrator to an Attorney for Money
due

due upon a Bill made out by him, for Fees and Disbursements on Account of Business done by his Intestate, the Bill was referred to be taxed.

Although the Costs of the Taxation of his Bill are not expressly given by the 2 G. 2. c. 23. to an Attorney, in Case a sixth Part thereof be not taken off, it was holden, very soon after the making of that Statute; that an Attorney should in such Case be allowed the Costs of the Taxation.

2 Barn. 89.
Hurft v. Dixon. Mich.
6 G. 2.

The same was holden in a subsequent Case; and by the Court: If a sixth Part of an Attorney's Bill have, upon a Taxation, been taken off, the Court is bound by the 2 G. 2. c. 23. to award Costs against him: But if a sixth Part have not been taken off, it is left to the Discretion of the Court, whether they will award Costs for him or not. The best Way, however, of exercising this Discretion, is to do in the latter Case, what is directed by that Statute to be done in the former. It has, moreover, been the Practice of all Courts, ever

2 Barn. Sup.
15. Barker v.
The Bishop
of London.
Hil. 28 G. 2.

since the making of that Statute, to allow an Attorney the Costs of the Taxation, if a sixth Part of his Bill have not been taken off.

1 Barn. 98.
Ecollier v.
Dutour,

An Attorney had delivered a Bill of Fees and Disbursements, to the Amount of five Pounds four Shillings and Two-pence: But he afterwards accepted of four Pounds fourteen Shillings, in full Satisfaction of his Demand. The Bill being afterwards, upon a Taxation, reduced to four Pounds five Shillings and Two-pence, a Rule was made, for the Attorney to shew Cause, why he should not pay the Costs of the Taxation. The Rule was discharged, upon the Repayment of nine Shillings and Four-pence, which had been overpaid; and by the Court: As the Attorney did, before the Taxation of his Bill, accept the Sum of four Pounds fourteen Shillings in full Satisfaction of his Demand, and, as the Money overpaid is not a sixth Part of that Sum, there is no Reason for him to pay the Costs of the Taxation, notwithstanding more than a sixth Part of the Bill delivered has been taken off.

A sixth

A sixth Part of a Bill, made out by an Administrator to an Attorney, for Fees and Disbursements, on Account of Business done by his Intestate, being upon a Taxation taken off, a Question arose, whether the Administrator ought to pay the Costs of the Taxation? It was holden, that he ought not; and by the Court: It is not reasonable, that an Administrator should pay Costs in such Case; for, as he is Stranger to the Business which has been done, he can only make out a Bill from the Papers of his Intestate.

MS. Rep.
Dutton v.
Agate, East.
20 G. 2.

Upon shewing Cause to a Rule, why the Prothonotary should not review his Taxation of Costs, the Question was, whether, as an Agreement in Writing had been entered into for Payment of Debt and Costs, the Costs should be taxed as between Attorney and Client? It was holden; that Costs should be taxed as between Party and Party.

Ca. Pr. in
C B 69.
Southmead v.
Northmore.

Arbitrators having awarded Costs, Price J. made an Order, for taxing them

Ca. Pr. in
C. B. 70.
Durrant v.
Kerr.

as between Attorney and Client. A Rule to shew Cause, why an Attachment for Non-payment of the Costs so awarded should not be taxed, was discharged; and it was ordered; that Costs should be taxed as between Party and Party; and by the Court: Costs ought always to be taxed as between Party and Party, unless there is an Order of the Court, or an Agreement of the Parties, for taxing them otherwise.

2 Barn. Sup.
15. Barker v.
The Bishop
of London.

An absolute Rule having been drawn up, for the Costs of taxing an Attorney's Bill, a Rule for discharging it was afterwards made; and by the Court: Such a Rule is quite unprecedented; there ought to have been a Rule to shew Cause.

C H A P. XLIX.

Of divers Matters, relative to Costs,
which did not fall under any
of the preceding Chapters.

IT was in one Case holden ; that all Statutes, which give Costs, are to be construed strictly ; Costs being a Kind of Penalty.

Salk: 205.
Cone v.
Bowles.

And in a modern Case, in which the Authority of the Case last mentioned was recognized, it was said by Lord *Hardwicke*, Ch. J. to be a Rule settled, and always adhered to ; that all Statutes, which give Costs, are to be construed strictly.

Rep. Time of
Harw. 357.
Rex v. The
Inhab. of
Glastonby.

If the Jury have found Costs, in a Case wherein Costs ought not to be paid, Judgment may be entered, without having any Regard to that Part of the Verdict, which relates to Costs.

2 Saund. 257.
Green v.
Cole.

If

Ca. Pr. in
C. B. 7.
Stores v.
Tong.

If the Jury have not found Costs, in a Case wherein Costs ought to be paid, the Court will order the Defect, in not having found Costs, to be supplied upon the *Postea*.

10 Rep. 116,
117.
Pillford's Case.

The Jury may assess a gross Sum for Damages and Costs, in as much as, the Word Damages does, in the large Sense thereof, include Costs; Costs being a Damage. But the Plaintiff cannot in such Case have Judgment, for a Sum exceeding the Amount of the Damages alledged in his Declaration; for, as it is uncertain, how much the Jury did assess for Damages, and how much for Costs, if the Plaintiff could have Judgment, for a Sum exceeding the Amount of the Damages alledged in his Declaration, he would recover more, as a Satisfaction for the Injury he has sustained, than he does himself desire.

2 Inst. 288.

It is laid down in one Book; that if the Plaintiff have alledged his Damages to be twenty Marks, and the Jury, after assessing Damages to the Amount of twenty Marks, do assess other twenty Marks

Marks for Costs, the Plaintiff can only have Judgment for twenty Marks; and a Case is cited from the 13 *H. 7. c. 16, 17.* in Support of what is laid down. The Case cited does by no Means warrant what is laid down in this Book; for the Jury did not, in that Case, assess the Damages and Costs separately, but did assess a gross Sum for both Damages and Costs; in which Case, for the Reason given in the Case last mentioned, the Plaintiff cannot have Judgment, for a Sum exceeding the Damages alledged in his Declaration. It does, moreover, appear, from the following Case, reported by *Coke Ch. J.* that what is laid down by him in 2 *Inst.* 288. is not Law.

The Jury, notwithstanding the Plaintiff had in his Declaration alledged his Damages to be forty Pounds, assessed forty-nine Pounds for Damages, and twenty Shillings for Costs. The Plaintiff entered a *Remittitur* as to nine Pounds, Parcel of the Damages, and prayed Judgment for Damages forty Pounds, and for Costs ten Pounds, nine Pounds,

10 Rep. 115.
Pilford's Case.

Pounds, as Costs *de incremento*, having been added by the Court; and Judgment was given by the Court of King's-Bench for fifty Pounds. A Writ of Error being brought in the Exchequer-Chamber, the Question was, whether Judgment ought to have been given, for a Sum exceeding the Damages alleged in the Declaration? The Judgment was, upon great Consideration, affirmed, by all the Justices of the Common Bench and the Barons of the Exchequer.

Str. 420.
Cutler v.
Goodwin.

Upon the Execution of a Writ of Enquiry, the Jury assessed separate Damages upon every one of three Counts, and twenty Shillings generally for Costs. The Plaintiff entered a *Remittitur* as to the Damages upon two of the Counts, and entered Judgment for the Residue, and for Costs. A Writ of Error being brought, the Judgment was affirmed; and by the Court: The Jury do always assess Costs generally; and the only Relief, which a Defendant can have in a Case like the present, is, that if he have been put to any extraordinary Expence
by

by Reason of a bad Count, the Court will make him an Allowance for that out of the Costs added *de incremento*.

In an Action of Ejectment, against several Persons, who lived in Cottages upon the Waste as *Paupers*, to try whether the Cottages belonged to the Plaintiff as Lord of the Manor, the Parish made Defence. The Plaintiff being nonsuited, and having paid the Costs to one of the Defendants in his Interest, it was holden; that the Court could not relieve the Parish or the other Defendants.

Str. 516.
Jordan v.
Harper.

Upon a Rule to shew Cause, why an Attachment should not be awarded against the Plaintiff, it appeared; that a Rule, for setting aside the Proceedings in this Action for Irregularity with Costs, had been made absolute; that after the Costs were taxed, the Defendant *Bartlet* died; that a Demand of the Costs had, since his Death, been made by the other Defendant; and that the Plaintiff had refused to pay them. It was holden, that the Widow was entitled

Sayer 126.
Tilt v. Bart-
let and Wife.

tled to the Costs ; and by the Court : If, in an Action brought by Husband and Wife, there be Judgment of Nonsuit, the Survivor is liable to Costs ; and, *pari Ratione*, wherever Costs become due in an Action by or against Husband and Wife, the Survivor ought to receive them. If Damages and Costs are recovered, in an Action brought by Husband and Wife, and the Husband die after final Judgment, the Widow is entitled to the Costs as well as the Damages ; for these must always go together ; and consequently, as the Executor of the Husband is not entitled to the Damages, he cannot be entitled to the Costs. It is equally reasonable ; that a Woman, who survives her Husband, should receive the Costs due under a Rule of Court, as that she should receive such as are due upon a final Judgment. It has been said ; that in a Case, wherein the Duchess of *Hamilton* was, after the Death of the Duke, obliged to pay Costs due under a Rule of Court, the Duchess was a Party to the Rule ; it being a Consent Rule, entered into by her, together with the Duke,

Duke, in an Action of Ejectment : But the Opinion of the Court was not founded upon this Distinction. It was, on the contrary, expressly laid down ; that there is no Difference, as to the Obligation upon a Woman, who survives her Husband, to pay Costs, between such Costs as are due under a Rule of Court, and such as are due upon a final Judgment.

A Rule had been made, for the Prosecutor of an Information to pay Costs, for not proceeding to Trial in proper Time. As the Defendant died before the Costs were paid ; the Question was, whether his Executor was entitled to them ? It was holden, that he was not ; and by the Court : If the Rule had been, for the Defendant to pay Costs, his Executor would not have been liable thereto.

Str. 874.
Rex v. Earle.

The Plaintiff, in an Action of Ejectment, dying after the Trial of the Cause, it was ordered ; that the Costs, which would have been due to him under the Consent Rule, in Case he had lived, should be paid to his Representative.

1 Barn. 91.
Goodenough
v. Holton.

1 Barn. 93.
Hammond v.
Woolmer.

The Point, in a Case reserved at the Trial of the Cause, being determined in the Defendant's Favour, who died soon after, the Question was, whether the Plaintiff, who had entered into the Rule of *Nisi Prius*, which was made a Rule of Court, should pay Costs to the Defendant's Executor. It was holden, that, as the Duty arose during the Life of the Defendant, the Executor was entitled to Costs.

2 Barn 116.
Fyson v.
Cooke.

The Defendant, in Action of Replevin, having obtained Leave to amend his Avowry upon Payment of Costs, his Attorney after the Plaintiff's Death, of which he was ignorant, paid the Costs of the Amendment to the Plaintiff's Attorney. A Rule was made, for the Repayment of the Money.

F I N I S.



+

883. l. 15.

~~6282. cc. 1.~~